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THE THEORY OF LAW AND CIVIL SOCIETY.

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THE THEORY

OF

LAW AND CIVIL SOCIETY

BY

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Dedicated

TO

SIR HENRY SUMNER MAINE

AS

A TRIBUTE

OF RESPECT AND ADMIRATION.

PREFACE.

SEVERAL courses of lectures delivered by me at the University of Budapest during the past ten years, induced me to attempt a systematical exposition of the elements of the Theory of Law and Civil Society in a treatise, originally published last year in Hungarian.

The principal reason for reproducing it in English, and bringing it before the English public, is my conviction of the inaccessibility of the Hungarian language to any wide circle of readers, and the belief that some of the doctrines set forth in this volume may possibly be of interest to those engaged in an historical or analytical study of the notions and theories of law.

The sixth, seventh, and eighth chapters, particularly, which relate to an inquiry into the idea and characteristics of Society, contain novel matter, inasmuch as the train of scientific thought upon which they are founded has not, as far as I am aware, been as yet followed out to the consequences I have endeavoured to establish. As to the other contents of this volume I can lay but small claim to originality, but venture to hope that a detailed account of general legal theories and their history may not be considered superfluous.

The choice of English as the vehicle of my ideas is, moreover, but the due acknowledgment of a moral debt of gratitude. The impulse to the investigations I have tried to pursue, the methods applied, the conceptions of science and its functions from which I have started, and the ideals I have striven to attain, are derived chiefly from the study of

modern English theoretical writers upon law, and of an English school of philosophy. Herbert Spencer's Synthetic Philosophy suggested most, though not all of the general views set forth in these pages, and, on the other hand, Sir Henry S. Maine's publications—which have given rise and date to a transformation of the historical and scientific study of law, not less important, nor less healthy in its tendency than that initiated by Savigny—have indicated the direction in which results were to be sought. To these two great masters of contemporaneous thought I am indebted for the matter of this book, more than I am able to indicate in detail.

Among other modern English writers, many valuable suggestions and materials have been afforded me by Professor Holland's "Elements of Jurisprudence," by F. Pollock's "Essays in Jurisprudence and Ethics," by Professor Clark's "Practical Jurisprudence," and by I. M. Lightwood's "Nature of Positive Law."

Of German works, I have especially made use of Professor Voigt's "Das jus naturale, aequum et bonum und jus gentium der Römer," and of Professor Leist's "Græco-Italische Rechtsgeschichte," whilst amongst Hungarian books, the late Leo Beöthy's "Beginnings of Social Development" has furnished me with a great number of available data.

In conclusion, I have to express my thanks to Mr. Maurice Black, of Budapest, without whose kind assistance I should have experienced some difficulty in expressing my thoughts in an English garb.

BUDAPEST, *June*, 1886.

A. P.

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BOOK I.

INTRODUCTORY DOCTRINES.

CHAPTER I.

SCIENCE AND ITS CLASSIFICATION.

§ 1. THE philosophy of law and civil society, comprehends the consideration of the rules which govern the social life of mankind, and of the various forms of the latter; it is, in other words, the science which treats of the nature, import and system of the institutions of human communities, and sets forth the laws of their rise, mutual relations and ideals. As such, it is a branch of social science, and falls within the sphere of philosophical investigation. Hence, previous to entering upon the subject itself, it will be essential both to define the views which serve as a guide in ascertaining the character and establishing the division of the abstract sciences, and to analyze the connection subsisting between the philosophy of law and civil society, and other sciences relating to social phenomena.

§ 2. All science is, in truth, but a knowledge of phenomenal relations and their laws. Knowledge, again, consists of aggregates of notions formed in our minds, which correspond with the impressions produced on them by phenomena, and may be pronounced to be true or false, in proportion as it enables us to determine, more or less accurately, the identity, similarity or differences of recurring appearances. We obtain knowledge by means only of experience, which is derived either immediately from our personal observation, or mediately from our forefathers as an heritage embodied in our organism, and which has become part of ourselves. Experience, in its turn, grows out of the accumulation of single perceptions, and exhibits a

double series of phenomenal sequences. One, the subjective or individual, denotes the sequence of those multifarious impressions received by us promiscuously from every quarter, varying with the changes occurring in our own constitution and external surroundings, whilst their connection is reflected in the modification of our sensations and ideas only; and although this sequence of occurrences seems accidental, yet it is expressed in the consciousness of every individuality. The other, the objective or general series, is formed by ascertaining that identical phenomena invariably produce respectively identical changes, and that appearances of the same kind are likely to be followed by other fixed appearances. The connection of this second series of consequences lies outside our own individuality, is independent of it, and is embodied in the outer world, which is, in truth, but a web of appearances constantly changing in a certain and fixed order. As a consequence, we are brought to consider this order, being, as it is, absolute and knowing no exception, as necessary, and conceive of it as an unbroken chain of causes and effects; in other words, as the result of the laws of nature; understanding, of course, by the latter, those relations of phenomena, the sequence of which is recognized as permanent and subject to no exception, and conceived to be unchangeable for ever. The notion of relation itself is merely that of a connection between two or more appearances, by virtue of which the condition or change of any one of them is interdependent with that of the other, which it causes or whence it is derived. Knowledge, therefore, may be ranged under the head of either order of appearances. When made up of notions linked in a subjective sequence, it represents the train of thoughts of an individual mind, whilst, when gathered into an organic system, that is, grouped according to a series of appearances conforming to the rules of the laws of nature, it is denominated science, which latter therefore may be defined as a knowledge of relations and laws.

Science, in this sense, is the interpreter of phenomena,

for scientific explanation is tantamount to a demonstration of causality. Hence, science is restricted solely to the knowledge of appearances and their relations, and can never extend further. We are utterly unable to ascertain or to know either the nature of the links which connect subjective sensations and the manifestations of intellectual life with events or external impressions, or what the essence of matter, motion, life, sense and intellect consist of, since every human sensation, notion and atom of knowledge is relative to, and dependent upon, the constitution of man. We know of things, or rather of their effective properties, only as they reveal themselves in appearances, and by the name of substance itself we merely designate that which we imagine to be hidden beyond the manifestations of natural forces; the reason is, that our mind, owing to its habit of personifying, finds a greater satisfaction in the idea of a cause exhibiting the properties of persistence and of tangible matter, than in that of one supposed to be evanescent in its nature. Even identity and difference convey to our minds no other meaning but that of the uniformity or divergence of possible direct or indirect impressions on a human subject.

§ 3. Now, if it be true that the world of appearances sets fixed boundaries to knowledge, and, consequently, to science also, we may well ask, what is the nature of those conceptions which soar beyond it, and rove outside the precincts of common experience, and to what sphere they belong? The human mind, in sooth, suggests questions innumerable regarding this realm of mysterious twilight. Nor is this to be marvelled at. Man strives for peace, a final and definite peace, and reluctantly accepts in its stead an endless chain of causes and effects. Besides, in proportion as the mind is less trained, and meets with a greater number of phenomena whose laws it is unable to grasp, the more readily disposed is it to look for their explanation to supernatural agencies, such as those which give rise to the apparently capricious workings of the human will; an explanation all the more adapted to please the undisciplined

mind, seeing that human interest is always aroused to a higher degree by the secrets of man's destiny than by the problems of pure truth. Indeed, as regards the problem involved in the former, it is not sufficient merely to scientifically satisfy human curiosity concerning it, for the emotions, personal doubts and anxieties it evokes imperatively demand to be set at rest by means of faith. Hence it is, that what is called by Kant the "Intelligible World" (*i.e.*, the realm of Divine attributes, of the immortality of the soul, of moral liberty, of the absolute and immediate precepts of reason, of law, and of political organizations, whether of Divine institution or resting on the dictates of pure reason), although absolutely incomprehensible by means of mere analysis, is nevertheless ideal, that is, in harmony with the final results of abstract ideas, with the visions of imagination and the expectations engendered by human instincts, consciousness and traditions. The principles relating to matters of faith, whether claimed to be inspired or inborn, can be recognized merely as creations of fancy designed to allay the conflicts harassing our minds, or to satisfy our restless hopes and cravings. Although indispensable to our religious aspirations, their truth cannot be proved, because of our inability to apply to them the test of experience, nor, in spite of the contradictions they contain, can they be successfully refuted, and they consequently do not fall within the scope of scientific enquiry. As religious teachings, confidently accepted as the revelation of a Supreme Power, they may be entitled to our respect, and when they present themselves in the garb of self-evident, fundamental truths, collected into a system, they may become the legitimate theme of metaphysics, resembling, in the latter case, science, in the exhibition of seemingly necessary connection of ideas, but differing from it, in not being formed of actual notions.

§ 4. Whilst, therefore, religions are as manifold as are the diverse revelations believed in, whilst metaphysical systems are as numerous as the various ways in which men endeavour to evolve their creeds from their own reason, or to found

them upon general notions of their own, supposed to be self-supporting, and whilst the contents of religious as well as of metaphysical systems are as boundless as the range of human imagination and desires, science, which is not less infinite than the world, and therefore than truth itself, always remains one and uniform. This, however, can only be admitted to apply to science so perfect, complete and exhaustive as to comprise the entire sum and system of knowledge, embracing every single appearance in the whole universe. Since, in such a case, every appearance would be exhibited in the chain of each of its causes and effects, every item of knowledge, too, would find its proper place in the relative order of its connections, and each would throw light on an endless series of antecedents and consequences. We ought, therefore, to be able to distinguish as many sciences as we do separate groups of phenomena and knowledge. But, in truth, the universe does not present the spectacle of separate disconnected threads of appearances. On the contrary, all our experience constantly points to their most intimate union and continuous connection; all co-existent factors are ever reacting upon each other, commingling in the production of common results, and may be traced to a common origin. Every atom reflects in itself the actual state of every other part of the universe, and every change is evidence of the rule of the uniform law of nature.

The hypothesis of such a law derives therefore its origin not only from the psychological fact that we are prone to consider the outer world as a unity, by reason of comparing it with the unity of the mass of our individual consciousness, but it is also supported by the evidence of experience. For, in analyzing the multiplicity of appearances, we discover them to be cases of the application of laws, growing ever more general and decreasing in number and complexity. Besides, forces are found to be convertible and expressive of equivalents of each other, and the properties of the material elements themselves appear inter-dependent and present the possibility of being

enrolled in an ascending series, and, consequently, of being reducible to each other. Thus, the most satisfactory explanation of the material world seems to be conveyed by supposing it to be a mechanical totality, the effect of the concurrent operations of a single force, proceeding from an infinity of centres of power. The unity of perfect science corresponds, therefore, entirely with the unity of the universe.

Of course this assertion can be only supported by showing spiritual life to be also amenable to law, and to be in every respect unavoidably connected with the world of material appearances. That such is the case, we may infer from the experience that every single moment of spiritual life may be reduced to some change of sensation, and that every sensation is again accompanied by some material modification of the sensible organism as to some of its circumstances, whilst, on the other hand, some change of sensation always follows every material impression, although it be not always expressed in conscious perception. This experience does not necessarily lead to the doctrine of materialism, which supposes that material factors are transmuted into spiritual forces, and that the same transmutation also takes place conversely. Nay, such a supposition seems to be excluded by the principle of the persistence of force, at least according to our present capabilities of measurement, experience showing that every material change demands an equivalent quantity of force for its material cause.

Yet, since physical and mental experiences develop and grow more and more complex in strict parallelism to each other, it is undeniable that an intimate connection exists between the two groups of phenomena, and that mental life, arbitrary in the consciousness of the subject itself, is, when considered objectively, amenable to the uniform rule of law.

§ 5. But even allowing that the spiritual and material world were each subject to a different and separate class of laws, and that we were unable to entertain the

hypothesis of a parallel course of causality permeating both—a supposition which can hardly be conceived, if we consider the permanent connection and intimate interaction of impressions, sensations, ideas, wants, emotions and actions, which are never marred by a single exception, —we should, even in that case, be merely obliged to recognize two sciences, connected indeed with each other, yet irreducible to any common higher law, each relating purely to phenomena, or rather to relations subsisting between appearances, and each being conclusive as to the laws of causation within its own separate province.

The notion of science itself excludes however, under all circumstances, the doctrine of metaphysical free-will which represents the human will as being absolutely arbitrary, and, consequently, as an independent, self-acting source of mental, and therefore indirectly, of material, force. This doctrine is opposed to the uniform order of nature, that most general and most indispensable fundamental principle of science, the negation of which would be subversive both of the possibility of the conservation of energy, and of the idea of expediency. Uniformity of causality forms the antecedent to expediency; for, in pointing out anything as expedient, it means nothing unless we presuppose causation, and attribute certain consequences to certain antecedents. Human action, therefore is, if subjectively expedient, objectively necessarily subservient to the law of causality, and it is under this aspect alone that it may be regarded as an object of science. If, nevertheless, attempts have been made at various times to construct a moral or social science of a different character, accepting metaphysical free-will for a starting point, such paradoxical efforts may be accounted for by the fact that human laws are neither natural laws nor scientific truths which permit of no exception, but, being simply the commands of finite knowledge and power, and not invariably in accord with expediency, or if expedient, not being always recognized as such, the individual may or may not obey them, and, as a consequence,

the apparently arbitrary attitude of the human will in confronting these injunctions is wrongly generalized by being transferred to a different object with a different metaphysical meaning.*

§ 6. Theology and metaphysics have, however, in this respect, trespassed on the domain of science and not alone for the above reason. Owing to the finite condition of human consciousness, perfect, exhaustive science, embracing the plenitude of the appearances of the universe, so infinite in number, and becoming thus homogeneous and uniform in reality, is impossible, and, since we cannot ever hope to know the entire mass of phenomena, but only fewer or more of them, our science also must needs remain fragmentary and incomplete. As a consequence, every notion of ours is imperfect, owing to our inability to enumerate every one of its relations, antecedents and consequences; besides, separate groups of knowledge, initiating diverse branches of science are classified, because we know the laws of the relations of appearances within their limits more thoroughly than we do those of their connection with phenomena belonging to other branches.

The universe is refracted within the human mind, like rays of light passing through a prism, and is there broken up into groups of appearances, each varying in hue; and, blind to the delicate shades of transition between them, we are only able to conceive the original light approximately by a synthesis of these colours. Hence, we are unable accurately to determine the limits of each department of science, or to point out with precision the laws with which any particular science begins and ends. The chain of causality extends beyond finite limits. Consequently, the fundamental principles of every group of

* It is assumed in the first place that Divine law identified with natural law resembles human law. Starting with this assumption, the breach of Divine law is considered the foundation of evil. The existence of evil is then placed in antagonism to Divine omnipotence and goodness, and thus results an irreconcilable contradiction, which at last is explained away by the doctrine of absolute free-will.

science lie beyond its proper boundaries, in part amongst the results of some other previous groups, in so far as any causal connection traversing both groups may have been ascertained, and in part do not yet rise to the dignity of science, being incapable of verification, and being thus mere hypotheses, that is, notions accepted provisionally as true, in hope of their possible explanation or ultimate verification.

The mind not scientifically disciplined is often apt to overlook the necessity of verifying such suppositions, either because, from being used to them, it looks upon them as natural and a matter of course, or because, not being cognizant of the conditions under which they might be analyzed, and doubting the possibility of accomplishing this, it impatiently accepts its own notions as absolute, and sometimes even regards the inconceivable as eternally valid, and its investigation as a sacrilege. In this manner, the separate and special branches of science, deduced from theological or metaphysical principles, originate. As regards the question, however, how a system built up upon notions antagonistic to science can contain real and actual knowledge, we must reflect that partly these notions themselves, and partly, too, the conclusions derived from them, embody amongst their elements, whether inadvertently or fraudulently, some results of observation, and, moreover, that they always contain that concomitant idea of the uniformity of causality ineradicable from all thought, the latter itself resting upon experience. But as science progresses, all hypotheses become more and more severely analyzed, and as they decrease, they constantly grow more simple. Thus both metaphysics and faith recede step by step from the realm of knowledge usurped by them without due title.

Every new discovery, every new perfection, imparts to us a fuller power of vision, enabling us to pursue further the chain of causality into regions to which hitherto final expediency, the Divine will, or an abstract formal idea alone seemed to have afforded a clue.

§ 7. Yet—although pseudo-sciences, such as astrology, alchemy, or phrenology, have for the most part disappeared, and it has been shown that their formation could only have proceeded in consequence of a fancied connection between phenomena really independent, abstract ideas being accepted as previous truths—it seems, nevertheless, impossible to banish from science every metaphysical idea; because those notions of ours, which transcend the measure of our knowledge, have always a metaphysical tinge, and amongst these we must reckon the most fundamental generalizations common to all branches of science, as well as some intermediate hypotheses, owing to the necessary imperfection of our knowledge. For this very reason, a perfectly appropriate classification and grouping of the single branches of science becomes impossible. Universal, united, and exhaustive science alone could be unexceptionable, perfectly faultless, and entirely transparent from every point of view; but though science in this excellence may be approximated, yet it can never be attained by man. We must therefore rest content with a classification of science which is incomplete, inasmuch as our knowledge is fragmentary, faulty, and prejudiced, but in the design of which the recognized laws of nature find adequate expression.

§ 8. In classifying the sciences, additional difficulties again arise from the course of their historical development. The several groups of science, with regard to each other, are not developed in proportion to the order of the logical complexity of their contents, and none of them present a uniform and proportioned growth in their different parts. Phenomena do not present themselves for our investigation in the order of lesser or greater complexity, or of lesser or greater difficulty of comprehension, but just as they happen to be more or less striking, or are of greater or less practical value. For men observe and learn, not upon those occasions only when they make a special task of gathering knowledge; they generally do so much more accurately and thoroughly when employed in their

ordinary pursuits. Hence it is that, unless stimulated by some actual necessity for proceeding in our investigations, we frequently content ourselves with partial results in science, and, on the other hand, often attempt the solution of problems without adequate scientific preparation, and are, in consequence, compelled to resort temporarily to provisional suppositions and crude explanations. Purely scientific investigation and work, for exclusively scientific purposes and for the sake of discovering truth alone, belong to the latest and ripest of human pursuits; falling short of this, the gathering of knowledge is usually connected with some immediately useful occupation; and classification, being treated as a subordinate question, looks rather to actual applicability than to a scientific ordering of the matter. Hence we find that "sciences" were for a long time also "arts;" nay, that they were preponderatingly "arts" alone.

The discordant elements thus connected in the elementary stage of science, practical rules and theoretical laws, become dissociated only when the mixed modes of thought, according to which we believe all that we conceive of as being advantageous to be also true, are purified, and men are able and ready to progress in their convictions, not according to wishes and preconceived ideas, but along the undeviating road of experience and the conclusions derived therefrom. At this point, pure, actual science becomes distinguished from practical, applied knowledge, which contains the rules requisite to perfection in some field of work, and derived from theorems appertaining principally to one correlative true science, though partly also to others. Still, there remains a tendency to transfer divisions appropriate to applied knowledge to the realm of pure science, where such a mingling of considerations of expediency and truth can only lead to error.

We ought, therefore, scarcely to include applied science, or arts, in a division of science, nor should we properly establish their series as parallel to the groups of true science, and all that might be done would be to point out

which art presupposes knowledge relative to some special branch of science.

§ 9. Furthermore, we must distinguish between true sciences and descriptive sciences, which latter simply contain an enumeration of phenomena, and merely reflect them, as it were; whilst theoretical or philosophical science embraces the knowledge of their relations, to wit, of the laws governing the phenomena forming its matter. Thus, descriptive science lays open the diversity of appearances, and theoretical science convinces us of the unity of the laws of nature. Yet it is by no means easy to trace the line of demarcation between the two. Every description of an appearance is necessarily accompanied by settling its relations to other phenomena, and thus every descriptive science contains a theoretical part, which, in proportion as science advances, becomes more considerable. The more fully we know the relations between phenomena, the better we are able to describe them, and therefore, as theories become more thoroughly established, the facts of descriptive science are seen to be simple applications of the doctrines of pure science. Hence, for example, since the formation of species is known to be a consequence of general physiological laws, botany and zoology have, according to the theories of Lamarck and Darwin, ceased to appear as mere descriptive knowledge, but have, for the most part, become applied biology. The greater accumulation and the more exhaustive accuracy of the subject-matter of descriptive science tend in their turn to enlarge the horizon of true science and to impart to its laws a more general and correct expression. In consequence, a great many groups of science might be established, apparently inseparably connected with correlative descriptive sciences; and especially could this be done if some portion of knowledge be singled out with reference to any concrete part of nature, as, for instance, anatomy or geology, in which the description of phenomena and their explanation proceed hand in hand, and thus descriptive and pure science are mixed up in what may appropriately be called "Concrete Science."

Even if the distribution of observable phenomena into such concrete parts might afford a clue to the division of descriptive science, the branches of theoretical, philosophical, or pure science properly so called, cannot be distinguished on this ground. A different principle must be sought out for the accomplishment of this object. Each theoretical science must find its place in the order in which phenomena less complex and more reducible to the unity of law, take, by the application of a lesser degree of abstraction, precedence of such as are more complicated and harder to analyze, as containing more concrete elements; and the series of pure sciences thus established can also be used to fix a parallel order of descriptive sciences.

§ 10. If we now attempt to build up the hierarchy of sciences upon the foundation of this special principle of their classification, we are at once confronted with the first, most elementary and universal question as to what may in general form the object of knowledge, and in what manner.

The general laws of the relations of quality furnish a ready answer to this question. If these are recognized as being absolute and final, the knowledge of which necessarily corresponds with the difference of things, the science answering such knowledge is "Ontology," which is of a metaphysical character. But since we know all knowledge to be subjective, and that the mind is unable to conceive aught unless moving within the limits of its proper and inevitable forms of intuition, ontology, as exemplified in Kant, necessarily appears as the doctrine of categories. The categories themselves, however, not being ultimate and primarily innate conceptions nor irreducible qualities of the mind, but crystallized forms of the most universal experience of mankind, transmitted and augmented from generation to generation since the beginning of all time, the science of the laws of quality presents itself as objective logic, the function of which accordingly is to place before us a system of the laws of those necessary relations of quality which are observable in every appear-

ance, and thus enable the human understanding to effect a systematic grouping of the phenomena.

Next in order, after objective logic, come mathematics, the science of quantity, which, too, embraces laws of relations to which all the phenomena presenting themselves in time and space are reducible, from the point of view of succession and extension, of number and of situation.

Besides the notion of measure involved in all quantitative relations, there exists another abstraction of a universal phenomenon: force—namely, the possibility of change resulting from one phenomenon bearing upon another. The laws of force form the subject matter of mechanics, which, when engaged in the consideration of forces either acting independently upon each other or manifesting themselves in the formation of bodies, is denominated either physics or chemistry, and, when defining either the conditions of the state of equilibrium or those of the change of forces, is distinguished by the respective names of statics and dynamics. It is further subdivided according to the various manifestations of forces, into the doctrines of gravitation, elasticity, optics, and calorics.

Biology or physiology, again, deals with the consideration of the laws of phenomena of an order higher and more complex than those already touched upon, and treats of the relations of living or organic structures, whose parts are completely inter-dependent to such a degree that the function and change of each part are correlative with those of every other part, and are capable of absorbing nutrition and of reproduction.

Just as mechanics partakes only in part of the character of mathematics, and physiology is not as yet completely reducible to physics and chemistry, psychology, the science of the laws of the spiritual world, though closely connected with biology, cannot either be founded entirely upon the latter. Psychology embraces the theories of sensation, perception, ideas, conscience, the emotions, the will, and the imagination; and we may consider the theory of sensations, subjective logic, the doctrine of ideas or cognitions,

that is, phenomenology, and, moreover, theoretical grammar, and æsthetics, as also falling within its province.

The will and the conscience of individuals combining in human communities so as to become public will and public consciousness, and the laws relating to the same, are the objects of sociology or social science, which may be further distinguished into ethics, political economy, the philosophy of law and civil society, and politics.

To philosophy, finally, is reserved the task of demonstrating the connection of the several sciences and their possible union into one single and universal science, becoming thus the very crown of knowledge, by placing before us all the relations possible in the universe. Owing to its vast scope and boundless range, philosophy exhibits, according to the point of view from which it is considered, the most various aspects. In pursuit of its practical functions, in illustrating the value of science in the realm of human ends, it is the embodiment of the general intuition of the world. In establishing theoretically the connection of the sciences it stands forth as their connecting link and very climax. As a teacher, it acquaints us with the methods, order, and means by which science is constructed and evolved. And precisely as philosophy, applied to the subjects of descriptive knowledge, can be considered as divided up into several sciences, the general doctrine of method can also be imagined as being split up into separate methods for each separate branch of science, the relations between these distinct methods being identical with the relations of the several sciences to each other. One way, therefore, of determining the nature of a science is to define its method. Hence, in attempting to accurately define the character of the philosophy of law and civil society, the science which considers the laws of nature in relation to human laws and institutions, we find it to be indispensable first to enter into an investigation of the method by which this result is to be achieved.

TABLE OF THE DIVISIONS OF SCIENCE, PURE, CONCRETE, DESCRIPTIVE, AND APPLIED.

Sciences (Pure), Theoretical, Philosophical.	Concrete Sciences.	Descriptive Sciences.	Arts (Pursuits), Applied Sciences.
A. Objective Logic.		*A.* Axioms and Definitions concerning Relations of Quality.	*A.* Speaking. Writing. (Reading.)
B. Mathematics. Arithmetic. Analysis (Algebra and Functional Theory). Geometry.		*B.* Axioms and Definitions concerning Relations of Quantity.	*B.* Reckoning. Measuring. Chronology.
C. Mechanics. Statics, Dynamics. Physical Chemical Science. Theory of Gravitation. Theory of Elasticity. Caloric and Optics. Theory of Electricity and Magnetism.	*C.* Astronomy. Crystallography. Geology. Physical Geography.	*C.* Descriptive (Experimental) Physical Science and Chemistry. Mineralogy.	*C.* Navigation. Applied Mechanics. Mining. Architecture. Industrial Pursuits.
D. Biology. (Physiology.)	*D.* Pathology.	*D.* Botany. Zoology. Anthropology. Palæontology. — Anatomy. Histology. Morphology. Embryology.	*D.* Agriculture Gardening. Cattle Raising. Pharmacology. Medical Pursuits.
E. Psychology. Theory of Sensation and Perception (Æsthetics of Kant). Subjective Logic. Theory of Ideas. (Phenomenology.) Dialectics. Theoretical Grammar. Æsthetics.	*E.* Comparative Grammar. Philology. Comparative Theology.	*E.* Descriptive Psychology. Languages. Ethnology. History of Literature. " " Philosophy. " " Fine Arts. " " Religion. " " Civilisation.	*E.* Teaching. Education. Treatment of Lunatics. Spiritual Ministration. Poetical and Artistical Production.
F. Sociology. PoliticalEconomy. Ethics. Philosophy of Law and Civil Society. Political Science.	*F.* Philosophy of History.	*F.* Political Geography. History of Nations. Statistics. History of Law. Positive Jurisprudence.	*F.* Commerce. State Administration. Legal Practice. Military Art. Judiciary Legislation.
Philosophy.	Cosmology.	History of Sciences.	Scientific Inquiry.

CHAPTER II.

METHOD.

§ 11. METHOD points out the course to be pursued by the mind in order to attain a solution of the problems presented to it.

Method is called scientific when employed for the purpose of ascertaining truth, a result which can be obtained solely by observing the real, and by establishing the pertinence of phenomena by means of inference. Both observation and inference, however, may be right or wrong. Method, therefore, in order to insure proper results, must provide safeguards against error, and these can only be found in those mental operations which exercise a control over our observation and reasoning. Scientific method, as thus explained, consists accordingly in the totality of those mental instruments by means of which we acquire, order, define and augment our knowledge, or, in other words, construct science.

§ 12. It is evident that these mental aids keep ever increasing with the development of science, and that thus the latter becomes the means of furthering its own progress. The progress of thought, whilst continually accommodating itself to the mass of knowledge already acquired, undergoes constant changes both as to its point of departure and as to its objects and results.

First, it gropes about in search of an appropriate way of proceeding, later, it lays its hands upon accurate and well-defined conceptions, until, in the determination of the connection between the latter, the judgment, in proportion to the greater extent of reviewable matter, is at last enabled

to occupy a more elevated point of view. A keener insight into one science enables us to fathom the unexplored recesses of another; heightened intensity is sure to follow every growth of the subject-matter of science, and method is more or less perfect in proportion to the larger or smaller number of accurate data at its disposal. Knowledge, growing more precise, enables us to distinguish phenomena which before seemed confused and entangled, and to add, at the same time, to our stock of observations. Gaining thus in breadth, knowledge demands a re-ordering, and when embraced in a system and discovered to be erroneous or deficient in some of its parts, calls for further correction and completion. Its circle reopens and widens with every fresh enlargement of its diameter. Method is, in this sense, identical with the progress of science, and as a corollary, science may in its turn be said to be the embodiment of method.

Hence there are as many special methods as distinct sciences, and again as many as there are stages of development through which each particular science has passed. These separate methods, however, may be reduced to a general method, seeing that phenomena are inter-dependent, that human faculties harmonize with each other, and that science in its totality is homogeneous. But just as every science merged into one single and perfected science mirroring the universe would lose its special characteristics, so would the method applicable to the latter be of a nature quite different from those employed about sciences in course of formation.

That ideally perfect knowledge, and that faultlessly complete consciousness, which would behold the universe in its unity and the network of all its relations in its total connection, would be independent of all reasoning, for a single glance at any one atom of the whole would then be sufficient for the simultaneous comprehension of every other of its moments. In proportion as the several sciences are gradually drawing nearer to the ideal standard—although necessarily divided from it for ever by an un-

fathomable distance — the results achieved by them emancipate themselves from the methods pursued in their development; for truth, obtain it by whatever means we may, always remains one and the same, and the greater the number of its ascertained relations, the greater will be the variety of methods whereby it can be demonstrated. The question of method rises therefore in importance, the less developed the science is, to which it is to be applied, and the more intricate and the more concrete the elements entering into the problem to be solved appear to be.

§ 13. It is therefore obvious that, with regard to our most elementary knowledge, the part played by method is most insignificant and almost identical with its function in relation to perfect ideal consciousness stated above.

The most universal and indubitable conceptions embodying our simplest and most general experiences,—as those of quantity and quality, of identity and difference, of time and of space, or rather of extent and of succession, of force and of relation, in other words, the notions of cause and of effect, all results of the most primitive and and ever-recurring observations,—have become such essential component elements of the human mind, have formed so invariably a part of our past experience, and are so indispensable a condition to all future experience, that we are now unable to conceive of them otherwise than as absolute knowledge, nor in any other way than by way of intuition.

Observation and inference, the constituent elements of every method, do not part company yet in objective logic.

§ 14. Every method, in fact, consists of such a combination of the various phases of these two modes of proceeding as enables us to obtain reliable results.

Observation supplies us with our matter: the knowledge of phenomena, and again and again repeated by us leads to experience. This is followed almost unconsciously by the first comparison, abstraction, and generalization, by the co-ordination of isolated facts, the substitution of

symbols for future reference, and, finally, by sequences of phenomena framed into laws. Here begins the task of deduction, which develops the inferences and invests the connection observed between the groups of phenomena with that character of necessity which appertains to all reasoning.

§ 15. This is effected in the first place by deduction. Deduction renders it apparent to us that a given phenomonen or relation must necessarily exist owing to its being embraced in some familiar phenomenon or relation of a more general character. Hence the work allotted to deduction within the sphere of descriptive knowledge is that of arrangement and classification. Such deduction, by the aid of the continual comparison of classes of phenomena and of the laws bearing upon them, exhausts all those cases which may be supposed to be applications of the former, carries the propositions derived from established principles to their ultimate results, by resolving them into their elements, in tracing their connection with their causes, and elucidates concrete and intricate appearances. Deduction thus leads up to the recognition of new laws as being direct consequences of such as are familiar, and even penetrates, by dint of the power of combination gained through symbolical expressions, beyond the boundaries of imagination itself.

This accounts for the endeavour to construct the framework of all science from the order of analytical inferences brought down to their ultimate results. For the degree of excellence of form in science, of the precision of the knowledge it comprises, and of the reliability of its complete and unexceptionable logical order always corresponds with the proportion of that part in its construction, which is rigidly deductive.

Thus that branch of science may be said to be most advanced which reduces the greatest possible number of the phenomena within its cognizance to the fewest and simplest principles possible, a result which thus far has been most successfully attained by mathematics and, to a somewhat lesser degree, by mechanics also.

§ 16. The recognition of new phenomena cannot however be effected by means of deduction, for the less perfect our knowledge, the more mistaken will be the result of deduction founded upon that imperfect knowledge. It is, therefore, necessary that these results should be continually verified, and that a way of proceeding should be added, whereby we are led to new discoveries, and, through the knowledge of phenomena, to the knowledge of laws. The task of accomplishing these requirements has been assigned to the inductive method, which calls to its aid for that purpose observation consciously controlled.

Induction is the mental operation by which, through the universal application of the notion of the uniformity of the laws of nature, a general rule is derived from a given special case. In this way, we arrive on the ground of similarities to probabilities, single out the phenomena, which, through the properly established changes of the circumstances and secondary agencies, remain fixed, and, presupposing the permanence of the order of nature, infer generals from particulars, and laws from phenomena. Thus, while correcting our experiences by means of more exact observation, we keep acquiring fresh knowledge and enlarging our mental horizon.

The foundation of all science is therefore induction. It is true that in sciences such as mathematics, where fundamental inductions are very few in number and simple, and prove always true in their results, we are apt to lose sight of their original character; but in others again, especially in those sciences which treat of external phenomena, where we have continually to grope our way through concrete phenomena, ever starting up in new forms, and to be particularly careful to keep aloof from errors in the observations relating to those phenomena, the function of the inductive method becomes more conspicuous.

§ 17. The success of the inductive method depends, however, likewise upon a ceaseless scrutiny of its results, and it was the neglect of this precaution which caused this method to be but scantily appreciated in antiquity and

during the Middle Ages. It is of the first importance to carry on observations with accuracy, and to improve its modes by avoiding on the one hand subjective errors, and on the other hand by analysing and resolving composite phenomena into simple ones. To accomplish these purposes it is in the first place necessary to repeat our observations many times over, under varying circumstances, at different times and places. An additional assistance to observation—which at the same time promotes the possibility of analysis—will be found in the application of those artificial aids supplied with increasing abundance by progressive science, which, by strengthening and rendering more effective our senses, contribute a fresh element to the advancement of science. The most effective means, however, for the attainment of the double object before mentioned are afforded by experiments, that is, by the artificial reproductions of the phenomena to be observed, and their repetition under circumstances which give prominence to the appearances under investigation, and which, at the same time, permit the ascertainment of the changes affected in it by concomitant subordinate factors.

Experiments can only take place within the sphere of human mastery over nature, where we are able to actively interfere and produce, according to our own pleasure, changes in phenomena with a special view to their effects upon ourselves. Thus biology already narrows the limits of our performances in this respect; for, as soon as our experiments exceed certain permissible bounds, the organism to be observed is destroyed, and life, whose secret we are investigating, becomes extinct. Concerning man and society, experiments can be carried on but to a very inconsiderable extent, at least for the benefit of science, for in these cases, the phenomena touching also individual interests, are subjectively of such import, that their voluntary production is morally dangerous and sometimes even prohibited by human law.

§ 18. Hence, in the case of the methods employed in dealing with biology, psychology, and sociology, the

necessity of supplying the absence of the possibility of experimenting to any greater extent, by some other mode, becomes the more urgent, and they consequently call description and history to their aid. Scientific description is identical with accurate classification, and indispensable to every kind of knowledge and science, and it would therefore be erroneous to confine its application as being that of a special method to any particular group of sciences. As a means of perpetuating observations, it undoubtedly becomes more valuable in proportion to the want of opportunity for repeating them, and thus description comes to the front whenever experiment fails to do its duty.

History, again, in recalling the past to our memory, likewise furnishes our mind with new matter. The memories of past events place before us in abundant variety the cooperation of the most different agencies and the concurrence of the most diverging phenomena, thus supplementing our rarer opportunities for individual observation with the added experience hoarded up through ages of generations and through cycles of periods. This enables us to make our point of departure in scientific inquiries not only the abstract, *i.e.*, in pursuit of the rational order, but also the concrete, in pursuit of the historical order. If we besides reflect that the law of necessary causality is always pervading history as well, and that, by retracing events, we can discern their causes behind them, it will be found that history not only furnishes facts, proper matter for investigation, but that by means of it we can discover in the things of the past, the explanation of the present, and of every circumstance lying beyond it, and are able to fructify historical research by genetic or derivative and causal reasoning.

§ 19. The genetic method thus appears to be in reality the full application of the inductive way of proceeding to the facts furnished by history. Its conditions are, too, identical with those of induction, namely, the recognition of the existence of necessary causality in the course of history; that is, the positive denial of the assertion that

any event or phenomenon might have originated in some way, other than as the result of the co-operation of natural factors, and, further, the assumption of the essential permanence of the order of nature, and of its unity and uniformity at all times, and in all places. For, were we to believe that the natural forces prevailing in any place or in any age were altogether different from those experienced by us at present, it would become impossible for us to trace back causes through their effects, and we should fail to profit by the proudest achievement of science founded upon the genetic method, namely, its ability to supply, by theoretical means, the missing links in the memories of the past, and thus to fill up gaps in history.

But the genetic method obtains not only in matters pertaining to history, or to surviving external memorials; it also obtains in the case of many of the phenomena belonging to the province of psychology and sociology which involve any appearance, the origin of which was not accompanied by clear consciousness, and which has left no tangible mark behind it. The effect of this is, of course, that the method is enlarged to the extent of employing the help of psychological analysis in dealing with problems appearing in connection with those moments.

We then no longer inquire what the laws governing the relations themselves are, but how conceptions and theories formed in relation to them have originated. In other words, we do not investigate first the immediate question presented to us for explanation, but rather inquire into the rise of the view taken concerning the laws governing the matter to be investigated. Thus, in ascertaining the causes of the errors which may casually or possibly occur, we can also determine the omission of what factors may enable a correct theory to be formed. And, in this connection, the history of science proves to be, in addition, of powerful assistance. In enlightening us on the subject of the causes of the errors occurring in theories, we are also taught by it to avoid the faults incident to subjective reasoning. It gives prominence to the general laws bearing upon the

progress of science, and demonstrates their mutual effect upon each other, and thus becomes the instrument safeguarding the reliability of thought, our guide in the choice of the problems to be proposed, and an accepted surety for the proper application of method.

§ 20. In the case of sociology, however, even all this does not fully answer the requirements. For here we meet with the singular phenomenon that the matter supplying its topics is undergoing continual change together with the growth of science, and progressively so, seeing that phenomena of a higher order enter within the sphere of science.

Whilst the increased knowledge of man is unable, in the realm of physical science, to give any new properties to things, or even produce new combinations not open to explanation; and all new phenomena as they appear are either known, because they originate under our own supervision, or are such as have already been in existence, but have hitherto remained unknown, because they could be observed only by the aid of perfected instruments of measurement and investigation,—the phenomena having their place in the framework of sociology, being, as they are, moments of human thought and action, are themselves ever modified by the influence of the agencies continually affecting human views and wishes. Every advance in human knowledge, besides widening our circle of experience, constitutes a fresh incentive to human action, and becomes a source of new wants and of redoubled exertions. These again, in their turn, by occasioning impressions not experienced hitherto, contribute to the increase of our stock of information. This mutual action and reaction gives rise, in proportion to our increased capacity for comprehending the same, to more numerous, more varied, and more mixed relations between the human mind and the exercise of will, between the understanding and the inclination, and between science and practical work. And as mankind and society advance, and we are able more clearly to distinguish between the organs and their action, and

between that activity which has its own purpose and strives to obtain mastery over the external world, and that which is indirectly useful by giving direction to and controlling the former,—every single idea, wish, faculty, social group and aim stands out prominent and more defined, the number and complexity of the compounds of these elements increase, and the field of sociology is thus enlarged.

Method must therefore seek new means to enable it to keep step with the many-sidedness and complexity of the phenomena to be comprehended. It needs them all the more, as social phenomena can never be accounted for by mere deduction, that is, by reasoning from the nature of individual man; for the ways of thinking and the endeavours of individuals become modified in consequence of men associating together, and their improved condition gives rise to new sentiments, new ties, and new aims.

The growth and ramification of social science thus supplies its roots with a corresponding increase and vigorous life in individuals and in society, and lends fresh strength to the branches of the science of community.

Owing to the difficulty man has in remarking the changes which take place within himself, and to his disinclination to willingly admit in a concrete case his former state of imperfection, especially from a moral point of view, it becomes a chief requisite for the method to be applied to social science, to be able to make the modification of individual qualities and the condition of social changes, the objects of investigation.

This again demands some independent standard which will be discovered in the system of human aims alone.

§ 21. The aim of action is that part of the sum of motives inciting to action which proceeds from the agent himself and of which he is conscious. Every determination of will is, objectively considered, causal and necessary, but considered subjectively—unless it arises from the operation of any recognized external compulsion of a direct or indirect nature—free, and such an act, to the extent of its being conscious, is not called necessary but expedient.

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selves. It is owing to this its quality that our expedient activity may serve as a standard for our own being. *Aim*, in its conception, appears thus as an abstraction and as having, with regard to its origin, no connection with the outer world; it proceeds from our emotions and interests, is embodied in our will, and controls our activity to the extent in which our strength and ability correspond with our understanding.

But we may rise above individual concrete aims. They may be comprised and generalized into notions of aims of individual life, of aims of state, of human aims, and, in the case of faith, into the universal notion of the all-embracing purpose and aim of the world itself. Parallel with this, and corresponding with the system of aims, we may, by dint of our imagination, summon up before us an outline of the circumstances formed by the realization and complete attainment of each of these aims or of their sum; whilst at the same time progressing on the path of abstraction, we regard the embodied aims in the light of their being rulers over the circumstances, and not of their being mastered by them, and thus as absolute and independent. In this guise we are brought to the creation of ideals, that is, of conditions which, supposed to be of absolute expediency and definitely satisfactory, we fondly imagine to be free from the operation of any positive imperfections and obstructions, since we behold in them the fulfilment of our desires, and devote to them, for this very reason, the best part of our activity.

§ 22. Hence, as many ideals as fields of human wants and interests can be distinguished, which again vary in each of these according to the level of the desires, the

conceptions and imagination there prevailing. The elements of ideals are indeed universal in human nature. They rest in the first place upon the inherent wants of man, manifested in his desires. The consciousness of being able to satisfy such desires, coupled with the hope of success derived from former favourable experience, supply a second requisite in the construction of ideals. When these elements are transfigured by means of abstraction and imagination, we obtain ideals. Ideals, therefore, cannot spring up where one of these elements is either wanting or deficient; where either desire is extinct, or the will is crippled or the imagination enfeebled.

The senses, the will, faith, work, knowledge, public sentiment, all of these, if in healthy development, manifest their aims in the varied forms of their ideals: the aims of art in the ideal of the beautiful, the aims of power in that of rule, the aims of religion in the ideal of the holy, economical aims in that of wealth, those of philosophy in the ideal of truth, the aims of morality in the ideal of the good; ideals which, as to those who father them, are the only saving ones, representing, as they do, the highest degree of perfection, no matter how much they fall short of the spirit and expectations of other ages.

§ 23. Indeed, objectively speaking, the ideal is always relative, and its general practical value lies less in itself than in the incentive it affords to the heightening of human efforts, owing, in consequence of its relativity, to the very inability of realizing it.

Through the agency of the ideal the aim again becomes a motive, and in the midst of the exertions to which it urges us on, our abilities become invigorated by exercise, our experience expanded and our knowledge increased. No matter how gradual the change thus produced in the constitution of man is, its reaction upon the ideal cannot fail to make itself felt, and, although the form and the word expressing the ideal may have remained the same, their tenor and meaning will inevitably become different from what was expressed by them heretofore.

The transformation of the ideal will, consequently, partake of the character of the superadded first elements, even in such cases where man loudly proclaims its inchangeability as an article of faith, in order to save himself from confessing his disappointment, and to be enabled to cling to his belief that the most exalted which he has ever kept before his eyes has always been final and perfect, and must eternally remain so. We are continually striving towards new aims which are never fully attained; our present and actual state appearing as a mean between history—the realm of past and unconscious factors acting the part of causes—on the one hand, and between the ideal, the factors recognized in themselves as being conscious and as being aims, on the other.

The system, the series and the gradations of ideals run, therefore, parallel with those of the several states of things giving rise to them, and, as the former are derived from the latter, we may also conversely infer the circumstances of a generation, whose other memorials are lost, from its ideals. The ideals of a certain age which are, at the same time, the final forms of its modes of thinking, constitute its most enduring monuments, serve the purpose of supplying existing blanks and afford a key to history.

Thus we are enabled to read the laws of the different periods by means of the system of ideals, and whilst they in this way form the mile-stones along the road of the past, their theory affords a standard for judging the science of the present age. It calls our attention to the unavoidable imperfection and the probable erroneousness of our doctrines, it teaches us to understand why human problems after their apparent solution again spring up, and keeps alive within us doubts concerning accepted propositions, as well as that patience and trustfulness with reference to the developments and conclusions of the future which are part and parcel of the conditions of human progress.

The knowledge that the ideals of every generation, no matter how sublime, are sure to be replaced by the different ideals of another age, the conviction that the main blessing

of work does not consist in the immediate enjoyment of its fruits, but manifests itself in the increased capacity for, and the love of, labour produced by it, the harmonizing of the nobler springs of human nature with the motives which compel man to regard the satisfaction of his daily wants, by the reflection, that the advancement of the well-being of the individual paves the way for the ideals of the future; all these benefits proceed from the recognition of the progressiveness and the relativity of ideals. The part thus assigned within the realm of science to this almost fundamental doctrine may be well placed amongst the cardinal virtues of intellect, side by side with that part which, by the theological doctrine of morality, is justly assigned within its own province to believing humility.

§ 24. Thus, in the theory of ideals we possess the most efficient aid at the disposal of method applied to sociology. Deduction at all events can here be employed only as far as we are either able to find such general propositions in the final truths of preceding sciences as admit of being regarded as points of departure for further inferences, or as we may succeed in exhaustively and accurately establishing within the limits of social science itself a notion, the special results of which we afterwards investigate.

But, owing to the inevitable incompleteness of the sciences, and the gaps which mostly and more particularly occur between the separate departments of science, the number of the former is exceedingly small, whilst the latter, even if the fundamental notions were not open to exception, do not tell upon the science as a whole, but merely on some smaller portions of it. There is, however, at our disposal abundant material furnished by statistical description for the purpose of induction, but seldom sufficiently available to admit of being worked up at once; for social facts are of an exceedingly composite nature, and those very formations which seem most simple are of the most complex texture, and have been smoothed down so as to be convenient for use only by the long handling of history, as pebbles rounded off by the stream of time.

Here the especial value of genetical and psychological analysis, coupled with the history of science, shows itself, whilst the method derived from ideals furnishes us with the key to the relations subsisting between the institutions, and, on the one hand, between the endeavours, and, on the other, between the results.

§ 25. The importance of this theory of ideals may be inferred from the connection existing between it and that great question which detaches itself conspicuously from the vast matter of the social sciences—the question of human progress. There is hardly any historico-philosophical proposition which has given rise to more contention than, whether the advancement of civilization was or was not universal, and, consequently, whether it was or was not necessary,—meaning by civilization the extension of man's rule over external nature, and, conditioned by this and furthering it in its turn, the perfecting of the consciousness of community, of the disposition for association, and of the capacity for organization.

Whilst progress was, beyond all dispute, admitted to have taken place in single cases, it was frequently doubted whether this fact applied to the whole mass of humanity at large; and indeed were we to call for the votes of past ages and Oriental nations outside Europe on this question, the negative answers would overwhelmingly preponderate. The generations of but few historical periods, those of the golden age of Greek and Roman culture successively, and later, since the beginning of last century, the generations of our own age, have readily accepted the doctrine of progress, and have enthusiastically endeavoured either to spread it as a matter of faith, or to explain it scientifically.

The methods of proving this doctrine greatly differ.

The Encyclopædists and their school speak of it simply as a self-evident, indubitable fact, and as the triumph of intellect over prejudice. The rationalistic deists ascribe it to the Divine destiny of man. The metaphysical schools, with Hegel, identify it with the development of the being

or the like. The followers of evolution hold it to be [illegible] of the law of the universe as expressed in [illegible] nature. The relapses recorded in history, the lethargy into which numerous nations for long periods of time sunk, and the destruction of entire systems of civilization are declared by all of these writers to be but passing and apparent phenomena, to be accounted for partly by our inability to take in the whole range of the entangled and intricate results of human moods and activity, and partly by declaring them to belong to the class of causes ranged under the general law, according to which periods of intensive development must be ephemerally followed by periods of external extension. For, as they remark, in the individual, in society, and in the heart of humanity alike, a higher elevation can only be attained with the broadening of the foundations.

One thing is certain: with any people whose continuous formation of ideals is not arrested by the failure of one or other of the required agencies, progress must necessarily be furthered. Its tendency indeed may change with the change of the sphere of the ideals, just as the mutual relations between human inclinations and faculties are themselves being modified amidst the gratification of former desires and the springing up of new wants and wishes. Thus, the Greek ideal of the "harmoniously beautiful" gave way to the Roman one of "ordered power;" both again yielded to the Christian ideal of the "Religiously Holy," and more recently the latter itself has, in its turn, been replaced by the national ideal of independent and entire development, by the economical ideal of wealth, and by the humane and culminating ideals of scientific truth and moral benevolence. The question as to what field—allowing a certain degree of culture—is best adapted for the possibility of progression in the formation of ideals can be best decided by ascertaining whether people behold the golden age in the future, or look for it in the past, whether they expect its realization from fate or from an eternal power, or know it to be dependent upon their

exertions. In truth, while science retains life, its oretical task—that of explanation—will be always nded by the practical result of increasing human edom in opposition to the forces of nature. Knowledge in this sense power, for it enables us to make use of se forces in proportion as we gain a fuller insight into cumstances and into the conditions of action. Thus, investigating and following the order of nature, we come its masters, and succeed in directing the currents f the external world—although independent of us—towards serving, in obedience to the human will, the purposes of human aims.

CHAPTER III.

SOCIAL SCIENCES.

§ 26. Among all the phenomena of the world, of the highest order are such as present themselves in human communities which have already arrived at self-consciousness, that is in human societies, for they are founded on the greatest number of the most diversely compounded premises. The social sciences deal with the laws governing the conditions of their rise, existence and transformation, and are divided into four principal branches, corresponding with the four large groups of relations discernible amongst social phenomena; namely, into political economy, ethics, the philosophy of law and civil society, and political science.

§ 27. The first of these groups comprises those relations which arise within society itself and between the individuals composing it with reference to external agencies, as far as limited portions of nature may be subjected to human power and, becoming adapted to satisfy human claims, present themselves as component elements of wealth, as economical commodities. Political economy therefore contains the laws which govern the production, distribution and consumption of wealth, laws derived partly from the nature of the various factors of wealth and partly from human nature itself.

Political economy becomes national economy, when its [illegible] do not confine themselves to the determination of the [illegible]re of the relations subsisting between single individuals [illegible] society in general, but take also into consideration the [illegible]rate state-communities, with regard to their co-existence [illegible] to the relations springing therefrom.

§ 28. Whilst political economy thus extends to the relations between social and external agencies, the doctrine of ethics establishes the laws which guide us as to the motives of action lying within the domain of human society and which it presents to us as rules of duty and of the good.

The more ideal the motives of human activity are, the more independent of external circumstances will they grow, and the more will they appear to us as resulting solely from free-will, regarded subjectively. And since duty, in this manner, is its own law as regards the possibility of its future fulfilment, and as obedience to it always leads also to the increasing independence and to the maintenance of the internal freedom of the agent in the future, the doctrine of ethics may be likewise regarded as the science of internal subjective liberty. But since the fulfilment of duty—the realization of the subjective freedom of will—on the part of a single individual may be also regarded as the striving of an individual, supposed to be isolated and standing outside of society, for perfection, ethics are often considered as a branch of that science which relates to single individuals and not of social science, and are therefore classified, together with psychology, amongst the sciences treating of the individual. Yet although, through idealizing, we are in the habit of looking upon the individual's will and endeavour as the absolute source of his own development, they themselves are not, in point of fact, independent factors, but such as draw their sustenance from the outside and from the mutual action and reaction upon each other of man and of the circumstances surrounding him; hence the nobler springs of human activity show themselves to be of social origin. That the science referring to them properly belongs to the social sciences will become evident, if we reflect that all human activity, not employed directly for the purpose of satisfying some primitive material want, and thus not the result of the rudest compulsion of nature—every activity, in short, which may be regarded as subjectively free—springs from social conditions and is realized in huma

society. We may add the further consideration, that the province of morality comprises not only the individual but also every social sphere; nay, that it was recognized with reference to social relations even earlier than in relation to the inner conditions of the soul.

But to set all doubt in this respect at rest, we shall only add that the voice of conscience claiming the performance of duty is originally but the echo of social opinion, and that, deriving its strength from the customs, morals and views of life of the community, it only becomes independent gradually and by slow degrees. Hence morality, in point of fact, developed in connection with right, until, at length, a distinction was drawn between the so-called moral rights of imperfect obligatoriness—because respect for them was not compellable—and those perfectly binding rights which could be made available. It was only later that a sharp dividing line came to be drawn between moral law, affecting the motives of internal freedom and of action, and juridical law, determining external freedom; and furthermore, as a corollary, between the doctrine of ethics and the philosophy of law and civil society.

§ 29. Thus, political economy and ethics, when taken together, embrace all the rules which relate to the subject-matter of human activity. By this subject-matter we may, at the same time, also partly determine the forms of activity—that is, those external spheres which are filled up by its asserting itself. But, in determining this, we are also influenced by other considerations. Thus, we cannot, by the light of economical motives alone, determine the possibilities of mutual co-existence, the avoiding of collisions, and those conditions upon which social co-operation and social cohabitation are founded. Besides, there are other agencies and springs of human nature, which, in this respect, co-operate to a still higher degree, namely, those arising from discipline, faith, habit, opinions and hopes, and from the slowly developed capabilities of adaptation and organization. Thus the laws of the relations springing up between society and its members,

with reference to the sphere of their action and to their form of proceeding, are contained in a separate department of science. This department is the philosophy of law and civil society, and in this science, which deals with the conditions and forms of social co-existence, is to be found the solution of such questions as to how far the practical liberty of man may extend, under what circumstances society can exist, what are the laws which govern these circumstances, which social formations and institutions are possible, wherein the balance of society consists, and in what manner it may be maintained, and, finally, to what principles the variety of existing institutions may be reduced. This science, therefore, occupies the place amongst its kindred sciences that statics fill with reference to mechanics.

§ 30. The place of dynamics, again, is occupied in the social sciences by political science, which contains the laws governing the changes of the conditions of social co-existence, the mutual reaction upon each other of social circumstances, and, in general, those relations which result from the operation of the movements causing the transformation of society. Hence, in the same manner as political economy establishes the rules of the useful, ethics those of the good, the philosophy of law those of liberty and order, political science establishes the rules concerning the expediency of social institutions.

§ 31. All these four groups of social science draw their matter from experience, the results of which are presented by statistics, the doctrine which expresses social phenomena in numbers, by political and social history and by the history of law, to which latter may be added the description of the existing positive institutions and organizations.

The several facts with which we thus become acquainted, after being collected and generalized, afford us an insight into every possible institution and its transformation. In this way arises social anatomy, the schematics of morals and of law, which stand between mere description and pure theory, and which furnish, as it were, half-finished

products to be philosophically worked up and completed. These show, at the same time, what is final in the positive, what is still in act of formation, what is essential and what is merely secondary and accidental.

§ 32. The determination of all this is of like importance to political economy, to ethics, to the philosophy of law and civil society, and to political science, for all these four sciences have but one common topic furnished by the relations of human activity in society. There is yet this difference, that political economy extends to relations proceeding from activity, only in so far as they affect wealth; that is, to relations concerning the subject matter and end of utility, the mastery man has established over nature, with regard to its origin by production, as well as to such as concern participation in it by means of circulation and distribution, as also with reference to its results by consumption. Ethics, also, consider the relations of activity with reference to its subject-matter, yet not in their connection with the external world, but as proceeding from previous activity and as furnishing a motive for, and influencing subsequent activity, such relations being viewed as agencies which are of importance with regard to the problems of internal freedom, of striving after perfection, and of the harmonious development of the human faculties.

The philosophy of law and civil society again deals with the same relations, that is, with those arising from activity directed to any possible end, but only in relation to their form, that is, to those limits within which the spheres of activity, respectively of liberty, can conveniently co-exist. The philosophy of law and civil society accordingly regards, though with other eyes, all that which engages the consideration of political economy and of ethics. The discussion of the laws of political science, again, presupposes as an antecedent a discussion of all the other social sciences, for the aims and factors of social transformations present themselves as being either economical, or moral, or legal.

§ 33. The relations of human communities cannot, however, be discerned by means of direct experience alone,

and their laws are only in part deducible from the observation of concrete social phenomena. Social consciousness and activity can be always reduced ultimately to the consciousness and activity of individuals, and their explanation is furnished by the mental constitution and the situation of the individuals. The social sciences—in so far as they are of a deductive character—are therefore founded directly on psychology. The corresponding descriptive sciences, namely, descriptive psychology and the histories of literature, philosophy, religion, and art respectively, in delineating the notions, the ideas, the wants, the desires, the passions, the convictions, and the customs and ceremonies, supply that knowledge, the system of which is contained in psychology.

The science of psychology, making the matter thus obtained its point of departure, is based upon the doctrine of sensation, which, again, starting from the biology of the senses, sets forth what subjective impressions correspond with external influences, and thus proceeds to subjective logic. This latter comprehends the theory of the formation of notions and, in addition, that of the nature and construction of abstract and general ideas, and of propositions. Psychology further determines, on the one hand, the laws of the association of ideas, those of complex currents of thought and of the development of self-consciousness, and, on the other, analyzes the moments which present themselves as antecedents of, and as connected with, the notion of subjective liberty.

In establishing this notion, psychology starts by expounding the system of human wants and instincts, then leads on to the laws of the formation of will and resolve, and to their effect upon the mind, and concludes by developing the ideal of individual perfection. This ideal is the exponent either of the absolute assertion of some nobler component of human nature, spiritualized by superhuman grace, or of the full harmonious development of every human faculty, according as to whether the theory of psychology happens to be founded upon metaphysical or religious fundamental assumptions, or upon the basis of positive knowledge.

Thus the science of psychology in explaining, on the one hand, the perceptive and retentive qualities of the soul, and defining, on the other, its reflex and active elements, leads us by the discussion of the mutual interaction of the components of the human spirit, of thought, and of action, to the threshold of ethics, whilst affording, at the same time, a basis for the propositions of political economy.

§ 34. Both these sciences are thus of a deductive character, but only to the extent of the possibility of inferring their doctrines from the attributes of man and from the properties of his surroundings. As far, however, as these attributes undergo a change in consequence of social coexistence, they contain inductive components. For there is no doubt that, under the conditions of social coexistence, the interaction of the different faculties of man produces also such changes in the individual soul as render it altogether different from its original constituent elements, even as the chemical combination of simple elements form bodies possessing entirely new properties. Still in political economy the deductive character predominates. In matters of labour, production, and the securing of their results, man is guided by the instinct of self-preservation, and of the assertion of individuality or selfishness springing from it. The consequences of this sentiment of selfishness are tempered and modified by habit—which in itself is nothing else but the readiness to follow the part made easy by practice—by shiftlessness or by self-denial, arising from fear of prejudices or from a disposition to shirk trouble, and, in cases of higher development, even by consideration for the welfare of fellow-creatures. It is only by means of psychological analysis that these motives, their power and mutual relations can be recognized, and that the notions of conduct suggested by these motives, as well as the conditions resulting from such conduct, can be rendered clear. The ulterior problems, particularly important in political economy, concerning the comparative value of human wants and human endeavours with regard to the

aims of human life, can again be only solved by the aid of ethics. On the other hand, every economical development, every grade of recognition and satisfaction of wants, is productive of corresponding changes in the world of consciousness and desires, and the sphere of morals continually expands parallel with economical progress. With the widening of human rule over nature, man's inner world thus assumes more extensive proportions, and the establishment of the laws regulating his free motion within it requires higher and larger conceptions. Thus, unless the transformations taking place parallel with the mutual interaction of these sciences are continually taken into account, their theory can never completely cover their entirety.

§ 35. The philosophy of law and civil society, as well as political science—in so far as they are *sciences*, and not merely collections of practical rules drawn from descriptive knowledge, nor yet only systems of metaphysical or religious dogmas—are, in like manner, both based upon the method and truths of psychology. Their antecedent notions are not simple, for, being historical developments, their meaning and tenour are, in truth, the objects of psychological investigation and proof. Furthermore, the analysis of consciousness and of freedom of action, the separation of their material components from their subjective moments and their definition, the formation of the notions of accountability and responsibility, the elucidation of the ideas of society, state, and law, the rise of duty and public sentiment, and their assimilation with all the former, as well as their combined development in the consciousness of community and into the self-consciousness of the community—all these are matters resting on a psychological foundation. The solution of the questions involved in them requires, however, the additional aid of ethics. Indeed, the determination of the notion and of the theory of historical progress itself—as to whether it be real and essential, or only transient and formal, whether it be the manifestation of a universal law continually ex-

panding, or only a glimpse of a few sections of a vast permanent cycle comprehending periods of ages—depends upon the answer to be obtained from psychology as to this question: are the faculties of the human mind and the constituent elements of human nature liable to change in their proportions, force, and quality under any and what influences, it matters not how slowly and gradually; or do they eternally remain under all circumstances the same, although subject within certain limits to incessant fluctuations?

§ 36. But just as the self-consciousness of the community develops in parallel lines with the consciousness of the single individuals belonging to it, and just as we are enabled to obtain a clearer insight into the conditions and interests of the community, the more they are reflected in the precise perception single individuals have of their own circumstances, so, too, are the economical and moral agencies and laws connected with the legal and political factors.

The more independent of external nature man grows, and the greater his mastery over it, the more perfect may his social coexistence with his fellows become, and the less will his actions spring from motives of such a character as might bring them into collision with the interests of others. Thus the striving for the attainment of the good, the lawful, and the expedient begins where an emancipation from the blind forces of nature has already taken place, and man has recognized the useful. Yet the highest degree of utility is attainable in such a society only where its members are capable of the largest amount of co-operation, and are therefore individually good, and observe in their conduct the limits of law, and where their social organization is, besides, perfectly expedient. Ethics, again, comprehend the laws of internal freedom, those laws which determine the consequences of resolves—*i.e.*, of the truly individual and strictly spiritual element of actions with regard to the will itself—that is, with regard to the mind in which the will has originated; for the law of causality

being as universal and absolute in the spiritual world as in the material, every changing spiritual movement affects the whole soul and all its future complexions, and thus either brings us nearer to the ideal condition we strive for, or removes us further from the perfection of complete mastery over self. Every action, therefore, whilst, from the standpoint of its material advantages, the object of economical inquiry, at the same time falls under the sway of morality, not with regard to its outward result, but solely with respect to the intention hidden in it, only so far, namely, as it arises from an internal source, that is, from the activity of the will or lack of it, and thus serves as a source to new currents of formation of will. Accordingly, whilst economical rules are onesided, and allow the widest field to individuality, moral rules are again the severest and most restrictive, but at the same time the most universal ones in their application.

Activity, again, can be brought under the legal standard only when and as far as its external results come into collision with the activity of others, and thus affect the conditions of coexistence and social freedom; political laws can be applied only to those proceedings which tend to the maintenance or change of social institutions, and to the preservation or re-establishment of the social balance, and may be thus subjected to the criterion of social expediency. The rules of law and political rules take, therefore, a midway position between economical and moral rules. The former circumscribe human activity more rigidly than do the rules of morality, but they are less restrictive and confined to a narrower space. Many acts there are which exceed the limits laid down by moral legislation, or affront the absolute sense of duty springing from inner conviction, without offending against the inhibitions of law or the interdicts of politics. Yet, as man learns only by experience to distinguish the boundaries of his freedom of will, and adapts himself but slowly and gradually to them, he is able to form, at first within a small circle, nothing but an estimate of his own

interests; he needs protracted observation to be enabled to trace the ramifications of these interests to a community of a higher order. What is lawless may often seem to him expedient, and what is immoral, lawful. This may all the more readily happen, seeing that man is apt to be much more vividly impressed by the expediency or want of expediency of the direct results of his conduct, than by the influence exerted upon his fate by their remoter consequences. Man requires a larger amount of trained foresight —which can only be subsequently acquired—in order to submit to indirect social or, rather, moral coercion than to physical force; nay, a still larger amount of discipline is essential to enable him to replace the rule of external agencies over himself by the self-restraining rule of his own mind. On the other hand, again, as soon as moral principles are thoroughly understood, the explanation of their consequences is, within the sphere of individual life, a much simpler matter than is the work of picking out from the network of the complicated organization and manifold interests of communities innumerable threads of laws, and following each of them out to their final consequences. Thus, although the development of legal and political instinct as well as of habit is antecedent to that of the moral sense, yet the formation of ethical science rapidly outstrips the growth of the science of law and of political science; its method becomes a model for theirs, and its achievements serve as a basis for their theories. And since any undue preponderance of egotistical considerations over such as are due to others is a moral defect, and public sentiment a moral necessity, and the mutuality of individual and social interests as well as the universal harmony of interests as between communities form a postulate of ethics—for the fruits of behaviour in accord with the highest morality can only ripen and be adequately enjoyed by those who contributed to their production, where perfect public order, whilst answering public interest, affords also the possibility of satisfying the entire sum of all private interests—and since the more perfect the individual

members composing a society are, the more perfect will be its organization, the safer its balance, and the more satisfactory and definitely expedient its working, hence all that is moral is likewise lawful, and that which agrees with the rule of law is necessarily also socially expedient. The full fruition of economical usefulness is subject to these self-same conditions, for although based upon selfish considerations, it can be attained entirely by the most complete division and combination of labour alone—that is, by perfect social organization and readiness of subordination. The notions of the good, the lawful, the expedient, and the useful thus accompany each other and become identified in their ideals, and hence the realization of either of them must always in the very same measure benefit the rest.

CHAPTER IV.

THE SCIENCE OF THE PHILOSOPHY OF LAW AND CIVIL SOCIETY; THE LAW OF REASON; THE LAW OF NATURE.

§ 37. THE task of our philosophy of law and civil society is, like that of every other science, twofold: to explain the existing, that is, the totality of all actual phenomena, and to determine the possible, that is, what may be experienced in the future; to ascertain, by means of the past and present, the laws governing relations, and to calculate their operation for the future; to account for that which is, and to infer from it that which is to be—the province of our science extending thus alike to questions of origin and of futurity.

In those sciences which treat of the phenomena of human consciousness—that is, in the social sciences to which the science of the philosophy of law and civil society belongs—the ideals are contained in the futurities. That which is to be comes up partly in the form of what ought to be, for by this we understand those formations which may assert themselves by the counterbalancing of such agencies as—though they may in point of fact stand in the way of our desires—show themselves upon certain hypotheses to be removable.

Yet science not only contains ideals and leads up to them, but every method is in itself the realisation of some particular ideal in the field of knowledge and truth, and is an attempt to organise knowledge in such a manner, and to establish such a constitution of laws, as to correspond with the causal connections of the permanent relations of phenomena. Hence, every philosophical system, although

absolute in form—for otherwise it would not be philosophy—is, in fact, relative with respect to the sum and concreteness of the knowledge at our disposal, and to the measure with which, and as far as, it can follow the chain of causation. Thus a system of philosophy always presents itself to us, whether consciously or unconsciously, as an unconditional adoption—either provisional or supposed to be final—of a relative explanation, and is, in truth, but the relative accounting for of a result or object recognized as true. Hence, the philosophy of law and civil society, and, connected therewith, the ideal of law and state, the definition of which also belongs to the sphere of that science, although very models in the eyes of him who constructs them, are essentially relative and of a subjective character. Consequently, in the course of history they undergo a continual transformation, in keeping with their matter, which, as the ancient institutions of society and the development of new ties of community become more correctly comprehended, is ever expanding. Any one of their systems, however, may be adapted to various stages of abstraction. It may appear universal and general if, resting on the broadest basis, it derives its origin from an abstraction, which, taking into account all and every factor of human activity, is obtained through an insight into all the known rules of law and civil society, organizations, and into every possible condition, form, connection, and manner of communities, and ranks with the other ideals of the highest order of the age and sphere of culture within which it arose. Or it may appear as the positive philosophy of law and civil society, which confines itself to historically and theoretically accounting for the phenomena of a certain society or period, to the establishment of their results, and to the shaping of that proximate subordinate ideal which corresponds with the forces, desires, and endeavours manifesting themselves in this sphere. Any positive philosophy of law and civil society, being a theory confined to some special period of time or to certain circumstances, is, therefore, always a fragment of some possible general philosophy

of law and civil society, into the frame of which it may be fitted, and which, again, either occupies a standpoint already passed over, or one which is still being recognized. Thus, in the same way as a whole grade of concrete doctrines leads from positive knowledge to abstract philosophical science, might a whole series of systems of a more and more general character be likewise established before reaching the height of the universal philosophy of law and civil society. The advantage of these immediate systems consists in their furnishing a direct explanation, measure, and purpose with reference to the springing up, connection, pertinence, and consequences of institutions established within a well-defined sphere. It is the province of the general philosophy of law and civil society to solve the problem of the origin of all social formations within the limits of humanity, to elucidate their relationship, to calculate their effects, to define the conditions of perfect sociality, and to give an outline of a faultless and an ideal organization of a community, as far as it is possible to accomplish this at any time and place by the aid of knowledge already obtained and of the systems hitherto available.

§ 38. As soon, however, as it surpasses these limits, and the science of law comes forward with the claim of creating a system—arrogating to itself, in fact, truth of final validity, unchangeable for all future times, complete, unconditional, and unbounded, in which thus the ideas and ideals of law and the state would be all at once and for all time to become fixed, as being possessed of absolute validity—it forsakes the path of possible experience, divests itself of its scientific character, looks no more to facts for the verification of its doctrines, and, appealing to *à priori* conviction, discarding all subsidiary proof, demands the recognition of its absolute validity.

This conviction cannot be scientific, and—as it arises necessarily beyond the boundaries of knowledge—it must spring either from faith or from metaphysical speculations, thus belonging to the order of theological or metaphysical

conceptions. Accordingly, every *à priori* system of philosophy of law and civil society, deduced from some fundamental principle previously and unconditionally accepted, is either theological or metaphysical, and its ideal law appears as Divine law or as the law of reason.

Divine law is either revealed, as in the Old Testament according to Jewish conceptions, or, as in the whole of Scripture, according to the views expressed during the periods of the development of Christianity, and later by those writers of the sixteenth and seventeenth centuries who accepted the patrimonial theory, and in the beginning of our century by the leaders of the French ultramontane school, or, as in the Koran, according to Mohammedan teachings. In all these cases Divine law is likewise positive law. Or Divine law is derived from the idea, the attributes, the will, or the essence of the Deity, as was done by the scholastics after the establishment of ecclesiastical dogmatics, and subsequently by Leibnitz also, by the English theological utilitarian school, and at the beginning of this century by the German writers of the romantic school. In the latter cases Divine law is also ideal, in that it has the same meaning as the metaphysical law of reason, and both are derived from one common conception, namely, that of identifying the ideal, *i.e.*, the word of the Deity, with the intuition and commands of the understanding. This conception is also proclaimed by the Platonic and, in part, by the Stoic doctrines, and has been perpetuated for the literature of the world by Cicero, the great popularizer of the results of Greek philosophy.

§ 39. The notion of the law of reason can be conceived of, too, in many different ways, as soon as we begin to regard reason as something different to and something more than the mere faculty of comparing, judging, inferring, and generalizing. We may take it to be but a moment or fraction of the universal spirit of the world, as is done by the Stoics, Spinoza and Hegel; or an essence formed or manifesting itself parallel with the operation and processes of nature, as the Roman jurists of the age of the Antonines,

Grotius or Schelling, conceived of it; or we may regard it as a storehouse of inborn and general ideas endowed with reality, following the realists, or as the absolute ruler over the empire of practical reason, in other words, of liberty, which is its own legislator, as Kant and his disciples do. Indeed, as soon as we look upon reason as an independent source, whence something more than mere co-ordination arises, and from which we draw not merely the form, but also the subject-matter of intellectual and moral rules, we cannot help recognizing law as independent of all experience and as an *à priori* idea. The term "law of reason" itself—although its corresponding Lex Rationis has been used by almost every writer since Cicero—obtained only at the hands of Glafey during the last century any wide recognition as a technical term; it first attained, however, universal application through the expressions of the followers of Kant, when its propositions—answering to the most abstract conception of man—were derived solely from the necessity of the coexistence of beings, considered as endowed with the general qualities of liberty, reason, and sentiency, which were assumed to be the conditions of such coexistence. But as the subject-matter of every notion decreases in proportion as it is abstract and general, it follows that the most general conception is also the emptiest. The system of the law of reason founded upon the abstract individuality of man, and upon the naked idea of personality, remains thus an empty frame, bare of every historical relativity and practical applicability. Its doctrines cannot, therefore, be gauged by any rule based upon experience, nor can they be of service to social phenomena, either as explaining them, or as furnishing a pattern, or even an average standard; neither can they be made to serve the purposes of any ideal. Writers upon the systems of the law of reason have nevertheless—impelled by the association of ideas—unconsciously identified that which they knew, or supposed, to be general within the sphere of humanity with the postulates of reason, although it was not deducible from them directly;

they have thus, by the appropriation of rules drawn from experience, given body to their systems, although there was no essential connection between the two.

These rules are drawn from the matter of the most universally known positive system of law, namely, the Roman law, which, severed as it is from its historical connection, may, for that very reason, be idealized according to the necessities of the occasion. In proportion, however, as, from this cause, the rules contained in the theories of the law of reason, assimilate with modern positive institutions, are they deprived of that character of universal absoluteness which addresses itself to every man, every age, and every circumstance, and could be drawn only from their abstract nature. They must likewise renounce their claim to that non-relative truth of a higher order which attaches to the postulates of their fundamental propositions, and which vanishes the very moment they descend from the phantom-world of faith and imagination into the arena of facts.

§ 40. Yet besides Deity, reason, and the ideal, there is another notion which is very often objectised, and to which the untrained mind is apt to attribute absoluteness, namely, that of nature: one of the easiest, simplest, and most general abstractions.

The term "nature," with its numerous undefined meanings, the nuances of which easily intermingle, is exceedingly well adapted to designate ideas which we wish to look upon as independent of human activity, whether it be physical or mental, or as being antagonistic to it. The humanly positive is opposed to what seems a natural formation. For, indeed, the notion of nature can be taken to signify either the universe, or rather its animating spirit, or the general principle of things and active forces, or it may be assumed as their peculiarity, and, further, as that which is essential, or the substance of things; it thus accords with the antecedents of phenomena, with their conditions and attendant circumstances, as well as with causal connection—that is, with the law of causal necessity

Hence, the absolute law, supposed to be independent of the human will, has, ever since the earliest days of philosophizing, been denominated the law of nature. Whilst, therefore, the term "law of reason" has come into use much later than the idea which it serves to interpret, we meet with the designation "law of nature" long before its theory was called into existence. But it is, for this very reason, of such a flexible character, unites so many divergent conceptions, and furnishes a common form to so many different doctrines, that an unremitting sifting of them is indispensable, in order that we may avoid the historical and dogmatical mixing up of currents and periods of thought, which are entirely strangers to each other.

§ 41. Its earliest use was not in a technical sense. In contradistinction to the idea of the principal, guiding law which Heraclitus claims as Divine and as the nurtures of human law, Archelaus denies the existence of natural justice. The school of Pythagoras considers the Divine law to be founded upon number—that is, abstract and spiritual, and—together with Empedocles—to be unwritten and common both to man and to animals, both being regular in their instincts, and their conduct a proof of the incarnation of Divine order. Socrates would make the unwritten universal law, proceeding from nature, antagonistic to positive law, whilst the Cyræneics and the Sceptics, again, insist upon positive law and morality as being the foundation of right, and not nature. The Cynics, in their turn, distinguish the law of nature from the law of the state, and place the common law of virtue above the latter. Plato speaks of the Divine, perfectly true, only real, eternal, unconditional, and essential law as the ideal of all human law, and conceives of the former as a principle producing harmony in accordance with nature. In Aristotle, the law of nature occurs for the first time as a technical notion and term, and is identified with the *Divine*, the absolute, universal, common, original, and unwritten law, as contra-distinguished from the *human*, the written, special, and positive law.

According to Epicure, once more, the law of nature is the union of mutual utility, and this comprises the *universal* law established for the general advantage of man as well as the *special* law formed to suit the peculiar circumstances of individuals, and consequently the positive law also, where rising above mere caprice. Thus the term "nature" is employed by all these philosophers in a double sense: as signifying the ordered structure of the whole world, and at the same time the essence of things. On the other hand, with the Stoics, the law of nature obtains a well-defined philosophical meaning. Nature there appears as the manifestation of the single and homogeneous spirit of the world, whose several phenomena are connected together through the common law of right reason. The law of nature is therefore that common, universal, Divine, and good rule of reason which governs creatures combined in a natural association, regarding it as a reflection of the process of nature, in instinct as well as in the human understanding; it is the harmony of human justice with the law of the world, which results from the identity of moral and of material nature, independently of any positive institution.

§ 42. This identification of the law of nature with law conforming to general human consciousness—wherein Cicero immediately follows Plato and the Stoics—became the foundation of the Roman law of nature.

Cicero, in treating, with the exuberant redundancy of his genius, of the highest, the true, the only right and rational law of nature proceeding from the Deity, relaxed somewhat in the strictness of theoretical definition. The illustrious eclectic, however, enriched his subject by adding to it a new notion, namely, the principle of necessary equity, based on that antecedent condition of distributive justice and equality established by Aristotle. This idea of equity itself was not yet clearly defined with Cicero; for, besides the sense in which it was applied in the practical jurisprudence of the time, another shade of meaning attached to it, namely, a purely scientific and ethical signification

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founded upon the requirements of the conceptions of the natural and the right. These different notions assimilated more and more in the hands of the following generations of jurists, who, in the main, applied to their practical legislative work the method of logical explanation and inference.

The levelling *Jus Gentium* and Equity—consistent in character, conformable to the universal justice of the world-empire, and constituted moreover, in accordance with the general character of legal acts, from those elements of the institutions of different peoples which were seemingly identical, and in harmony with the convictions of all mankind—rapidly approached and soon amalgamated with the law of nature. Such law of nature was held to be of universal authority, deduced from the nature of things, valid, and consistent through the limpid transparency and precision of its logic (*elegantia*), and in consequence of this, as well as of its contrast with the ancient artificial civil law and of the attributes due to its origin, proclaimed to be simple and easy of application. But side by side with this its *popular* conception, the strict *philosophical* definition of the law of nature reasserted itself again with the great Roman jurists, who crowned the edifice of Roman law during the age of the Antonines. Gaius and Paulus see in the law of nature the outcome of the rule of objective expediency and of the ordering logical force contained in the relations of law; Marcellus identifies it with general Divine law operative in nature, and answering at the same time to the universal society of the whole of united humanity; Ulpian, clinging more closely to the Stoic doctrine, defines it to be the rule swaying all nature, manifesting itself in instinct, and thus common to animals also—a rule capable, moreover, of being ascertained by the postulates of reason and corresponding with the peculiarities of natural and legal relations. At the same time, the notion of equity—which had now become precisely defined—assimilated fully with the law of nature, and, owing to this association of ideas, the jurists of the later imperial age transferred the authority of the *Jus*

Gentium, considered as positively universal, to the law of nature regarded by its theoretical features as being universal. In the perfected system of the Roman law, therefore, the law of nature figured at once as the model and as the source of positive law, and also as a component part of it. To recede from it was therefore considered as human imperfection; to assert its authority, the highest aim of the legislator.

§ 43. With the rise of the Christian conception of the world, the notion of the law of nature likewise underwent a modification. It was placed into antagonism not only to positive law, but also to the law of Scripture—that is, the revealed Divine law, or—as scholastic writers express it—to supernatural law, and that in a twofold and diverging sense. In the first place, as a right rule, distinguishing, by the voice of conscience, good from evil. By this rule, according to St. Paul, "the Gentiles, which have not the law, do by nature the things contained in the law," and to this day the law of nature is so understood by the majority of English and French writers of the orthodox theological and spiritualistic school, whenever they make use of this expression. In the second place, the law of nature is represented—in a sense opposite to the former, although also derived from theology—as being identical with the law of human nature as corrupted by original sin, and therefore imperfect, and hence also as identical with the law of nations. This secondary law of nature—as it is styled by St. Thomas of Aquinas, in contradistinction to that primary law of nature founded upon Divine revelation, though also deducible from reason—was represented by the casuistic writers, prominent amongst whom was Suarez, and by those authors who applied the theory of reformation, as, for instance, Oldendorp and Winkler, as applicable to the natural man after he had committed sin and before he became a member of artificial society—that is, to that state of man, when society had as yet no existence. The distinction between these two meanings was however frequently neglected, and later writers described the law of

nations as the law of nature—originally in connection with the secondary meaning of this term—and often, especially under the influence of the theories of Roman law, as being identical in character with the law ascertainable by human reason and partly revealed in Holy Writ. Especially since Grotius comprised in his work all the previously existing doctrines pointing to common principles, and, like Socrates with regard to Greek philosophy, supplied all the modern tendencies of the philosophy of law with a common basis of departure, by propositions reconciling all their elements but those of theology, since then did the law of nature—as deduced from the humanly natural condition of man outside of society—come to be regarded as consonant to human reason, and hence as the law of reason itself. This hypothesis of the natural condition of man, first originating in theology, but subsequently adopting a metaphysical character, very soon was regarded in the light of a historical fact. As such it was first to some extent looked upon in the theories of Hobbes, partly also in those of Locke, but more decidedly in those of Rousseau and his contemporaries. Thus the law of nature was conceived of as residing in the breast of mankind before ever society was formed, and as continuing later in force, and actually influencing human relations outside the pale of society, as, for instance, to international relations. A similar conception may even be traced in the expressions of Kant. But when, in consequence of the criticism of the utilitarian analytical and of the historical schools, the untenable character of the hypothesis of this supposed historical state of nature became evident, the meaning of the term "law of nature" once more changed. The more modern writers, particularly those of Germany, considered the law of nature in its purely anthropological bearing, as conforming in general to human nature, and as approaching or receding from their systems—meaning the systems of the law of reason—in proportion, as the determination of the notion of human nature is either more abstract, or includes more concrete elements.

It is obvious, that with this last definition—which in

juxtaposition to the preceding pantheistic, theological, metaphysical, and pseudo-historical definitions may be characterized as anthropological—the system of the law of nature assimilates with the system of the philosophy of law to the extent, in which its definitions consider human nature as the sum of the qualities manifested in actual human conduct. It is, consequently, a summary of those laws which, taking into account all the factors of human activity, may be ascertained as being the conditions of social coexistence in all its phases and forms.

CHAPTER V.

DIVISION OF THE PHILOSOPHY OF LAW AND CIVIL SOCIETY.

§ 44. THE division of the philosophy of law must, like that of every other science, be effected according to the nature of those relations whose laws it establishes; for these laws are but the expression of the permanent interdependence of such relations. The different parts of the science correspond, therefore, in their formation with the several groups of relations.

The conditions of social coexistence—that is, the rules of such relations as arise amongst men in consequence of human activity, and having reference to the limits of that activity—can only obtain within the sphere of a social community. The form of a social community, which has attained a condition of complete development, and has risen to decided consciousness, is the state; whilst, above the community of the state, the universal interests of humanity present themselves as objects of still wider community. Hence, the relations manifesting themselves in the structure of the state, in the combination of its elements, in their mutual interaction concerning the community, and in the connection between the state and its factors, form the subject-matter of the first part of the philosophy of law and civil society, the laws of which are embraced in the law of civil society or public law. Within the sphere of the latter there may again be distinguished a second department, namely, private law, which deals with the consideration of such relations as may arise in the state amongst its single members, and which exercise an influence on public interest only indirectly, through the intervention of private in-

terests. The laws of those relations, again, which arise between the states with regard to common aims of humanity form the subject-matter of the third group, namely, international public law, to which may be added a fourth, to wit, international private law, which contains the rules that govern the private relations subsisting between persons subject to different territorial laws.

§ 45. The doctrines of the philosophy of law and civil society embrace the investigation of the institutions ranged under these four heads of law, and account for their connection and laws. Our knowledge of these enables us to ascend by means of the inductive method to the comprehension of those general and universal laws and ideas which are common to all of them, and present themselves as the abstract doctrines of the philosophy of law and civil society. If, conversely, we attempt to apply the deductive method, we must first assign the most prominent place to the notions, characteristics, ideals, origin, and forms of society, of the state, of right and of law, regarding them as the fundamental propositions of this science; and all these, again, we must follow up by those moments, which appear in all relations of public and private law, as well as of international public law and international private law, to be identical, and which may be styled the general doctrines of law.

§ 46. The general doctrines of law thus relate alike to institutions in all the departments of law. But, owing to the historical development of the philosophy of law and civil society, as far as it has proceeded, these doctrines have been evolved more accurately with reference to private law, than with reference to their relation to the remaining parts of law. This circumstance is explained by the fact, that the doctrines of private law received much more particular and thorough attention than those applying to other groups of law, and that they were not merely looked upon as being independent, but that, reversing the logical order, the institutions of public law were in a great measure explained by those of private law, instead of being made

to embrace the latter, which in truth form but a department of the former. The natural relation between these two groups of law points unquestionably to the subordination of private law. For the contact of individuals, with reference to their private interests, can develop only within the sphere of the community, and hence private law must move within the pale of the law of the state which regulates the relations of the community. These considerations become all the weightier, if we add, that the activity of the state is indispensably necessary in two directions, in order to maintain private law. On the one hand, it is the duty of the state, as the relations between the individuals multiply, to regulate these new relations, that is, to establish new propositions of private law concerning them; and, on the other, it is the province of the state to provide for the support of the existing private law, for the state is both a law-making and a law-maintaining community. Hence, private law is one of the results of the activity of the state, and as the law of public administration contains the rules of state activity, private law is, in fact, theoretically nothing but one of the constituent parts of the law of public administration.

The historical fact, however, that private law and public law each occupy a separate and distinct place, indicates that the former contains an element investing it with distinguishing characteristics. These characteristics must be sought in the conception, that any activity of individuals, proceeding from private interests, must unavoidably and unconditionally be recognized from the point of view of every public interest. Experience, nevertheless, has unquestionably taught us that it is impossible to draw a line of demarcation between private law and the law of public administration which would be fixed and hold good in every age and under all circumstances. It has, on the contrary, been found, that the boundary line between them is continually shifting, and that it is now private law, and now again the law of public administration, that is extending its sphere at the expense of the other. The activity of the

state being first of all enlisted, not in the furtherance of the aims of the individual members of society, but in the advancement of their totality and community, that is, of the state itself, the law of public administration, in consequence, extends to the regulation of all those relations, the ordering of which the state does not deem it safe to leave to the free and independent action of the individuals. Private law embraces all those rules which merely determine the general limits of individual activity, the state finding within these limits, in the efforts of individuals tending to secure their own private interests, a surety for the advancement of its own aims. Accordingly, the further advanced society is, and the more thoroughly individuals come to understand that by promoting public interests they are benefitting their own private interests, and allow themselves consequently, in the management of their own affairs, to be guided by public considerations, the greater will be the number of relations with regard to which the state may afford play to the free activity of the individuals and scope to individual right, and the larger will be the part private law will appropriate to itself out of the sphere of the law of public administration. On the other hand, again, in proportion as society decays, as energy directed to the promotion of the interests of state dies out in the breasts of individuals, will the state be compelled to extend the sphere of its power and authority, and to circumscribe in many respects the liberty of action of the individual. In other words, the greater will, in such a case, the number of those relations be, which again fall back under the sphere of the authority of the law of public administration, in spite of their having in many cases already previously belonged to the range of private law.

Thus private law, which invariably contains elements of public law, includes, in proportion as its sphere encroaches upon that of public law, a respectively greater number of these elements. For, beyond the factors taken from public law as above stated, all the institutions of private law, as, for instance, such as circumscribe personal status, or such

as relate to the law of property or inheritance, must, by establishing the sphere of the individual—who is the ultimate element of the state—by marking out the impassable limits of his will, as far as it has to be respected absolutely, and by thus pointing out the direction in which his activity may develop, invariably influence the formation of public law. Private law, therefore, although it concerns itself directly with private rights only, exerts its influence upon the constitution of the state by modifying its elements and conditions, and by determining the distribution of the factors of power in society.

§ 47. The reasons for which sight of this natural connection was lost are of a twofold nature. First—without now adverting here to those elements of public law which in every rule of private law are identical, but are hidden from sight owing to the fact that private law is considered as the mere regulator of the relations subsisting between individuals—because the propositions of private law are much more simple, precise, and more easily recognized, and therefore more readily reducible to a system. In the second place, the systems of private law, which obtain throughout the civilized countries of Europe, resemble each other much more, and show a smaller degree of divergence than those of public law—a circumstance due to a great extent to their being more thoroughly developed. Both these circumstances, however, are intimately connected with the real cause bearing upon the actual relations between the doctrines of private and public law, namely, the historical development of ideas and institutions with respect to them.

§ 48. The independent development of the science of law commenced in truth merely during the Roman Empire, and, after its dissolution, followed the lines of Roman thought. Before the period of the full elaboration of the Roman law, and subsequently to it, wherever its influence was not felt, we nowhere meet with scientific law in its genuine and proper signification. Greek philosophy busied itself with the state and with the ideas and ideals of justice, yet always in connection with religion and ethics.

The institutions of law were scarcely cultivated to such an extent in Greek public life as to allow of their being classified under definite headings; hence private law never detached itself conspicuously from the mass of public law. In Greek theories, therefore, no distinction was ever established between the different departments of law from their proper point of view, nor, indeed, was any attempt ever made to draw it. We first find among the Romans the rules of private law becoming crystallized, at first on the basis of public law, it is true, and possessing a decided character of their own. This distinctiveness of character was, in the first place, occasioned by the fact, that the Roman spirit was much more conservative in the matter of institutions touching private life than in the matter of public law, which latter was agitated by class interests, party strife, and the tremendous shocks of continual wars throughout the world. We thus find the Romans still closely clinging to the words and spirit of the twelve tables at a time when the Roman state had long since outgrown its condition of a mere communal state, and had, pursuing the path of universal conquest, entirely changed the character of its public law. When, later, the exigencies of trade and intercourse extending over half the globe necessitated a remodelling of the institutions of private law, the means and instruments employed were entirely different from those which were of paramount influence in effecting changes in public law. Thus it happened that the institutions of law, in their respective spheres, developed quite separately and independently of each other. The growth of the *Jus Gentium*, the exercise of the prætorial power in the edict through the promulgation of legal propositions drawn from the institutions of the various Italian populations, and simplified, moreover, in conformity with the proper nature of the legal relations, gave rise to the idea that through the *Jus Gentium* it was possible to construct a generalized private law, free from all relations with public law, which at first was designed for, and developed as, the law relating to strangers, but in course of time per-

colated into the body of the Roman law proper. When, too, subsequently, the notion of the *Jus Naturale* was also borrowed from Greek philosophy, and conceived as a simple natural and universal law relating to all men, and not as one that could be established in a particular state only, only valid through the authorities and the public law of that state, the independence of the science of private law became complete.

This was especially the case after the ancient *Jus Civile* had become entirely hidden from view by the *Jus Gentium*, and the *Jus Gentium* itself shortly after identified, as it was in the later era of the empire, with the propositions and institutions of the *Jus Naturale*, as developed by the jurists of the age of the Antonines. To this we must add, that private law, meeting the requirements of the universal intercourse and commerce of the Roman world-empire, was continually expanding and gathering fresh volume down to the Imperial period; a result to which the *Responsa* of the jurisprudents, relating to private causes only, but possessing as to these the force of law, in great measure contributed, whilst public law dwindled and decayed in the state which now bore the character of an absolute monarchy. From the time of Diocletian and Constantine, however, after the empire had become reorganized upon a new system, the development of private law itself arrived almost at a standstill. In the digests and code of Justinian private law comes again to the fore, and this magnificent collection of the results of Roman jurisprudence contains scarcely more of the propositions of public law than as immediately relate to the doctrines of private law.

§ 49. In the barbarous states which arose upon the ruins of the Western Empire we perceive a wide gulf fixed between public and private law. The former, adapted to the level of culture of the conquering tribes, is quite primitive; and, although their princes were not wanting in efforts to associate their power with the idea of the Roman Empire, yet, up to the time of the coronation of Charlemagne, these efforts were attended by scant practical results.

The Roman law, however, survived, partly as the private law of the ecclesiastics and of the subjected Roman citizens, and partly as the principal component element of the ecclesiastical law. Its influence made itself felt, besides, in the recasting of the institutions of the private law of the barbarous tribes, and its effects upon the progress of feudal organization, soon after, were unmistakable. Indeed, it is especially in this province that we for the first time discern the forms of contract worked out in Roman private law, acting a part, which subsequently became of great importance, namely, as serving for a medium of establishing institutions of public import, without, however, this service having been scientifically recognized, since, at that time, no scientific doctrine had as yet arisen with reference to these circumstances.

When, in the twelfth century, the Roman law began to be again studied at the University of Bologna on the basis of the codes of Justinian, we meet with an attempt on the part of the school of glossators to extend the influence of the Roman law, and to secure its adoption on the strength of the theory of Imperial public law. The result, however, was, that, whilst the establishment of the world-empire and of Imperial power by invoking the aid of the supposed principles of Roman public law remained an idle dream, the body of Roman private law appeared as the virtual realization of an ideal. The reason for this was obvious. The system of Roman private law, owing to its high degree of perfection, exceeded by far the needs of life and the practical organizing ability as well as the scientific theoretical capacity evolved under the circumstances of those times. This accounts for the remarkable phenomenon, that the church, which had reached the climax in its public organization, in that it claimed even supremacy over the state, placed itself into antagonism to the Roman law, and indeed to any scientific cultivation of private law. It explains also the fact that, with the increase of intercourse and the prevalence of a higher standard of culture, the Roman law extended more and more its domain in the communal

states of Italy, in Southern France, and at length in Germany also, and that, whilst during the period of the *Renaissance* it figured as the only truly scientific law, it was again entirely out of connection with the organism of the states undergoing a process of development, which were continually withdrawing more and more from under the shadow of the Roman Empire.

§ 50. The doctrines of private law, owing to the acceptance of the hypothesis of the state of nature as a foundation for explaining the institutions of law, dating from the seventeenth century, obtained an increasingly preponderating influence. The law of nature presented itself as the law of the state of nature, and this condition of nature lying outside the state, the law corresponding with and proceeding from it was purely private law, relating, as it did, to the concerns of single individuals outside of society. It was from this law of nature that the institutions of international law as well as of public law were derived, the principal doctrine of which, the foundation of sovereignty, was explained by reference to private law, either in being reduced to contract, as we find it done by Grotius down to Rousseau and his school, and again by Kant and the modern writers on the law of reason, or in being reduced to the law of property, as was done by monarchical writers and Haller.

These conceptions were finally reversed by the doctrines of the historical school—particularly by those of Burke in England, later by those of Savigny and his followers in Germany, and of the authors belonging to the English analytical school, with Bentham at their head—and it is only since that time that the doctrines of public law have been freed from the trammels of private law. The further scientific development of these doctrines, and the determination of the natural relations between private law and public law, in our days, must be ascribed again to the impulse given to the science of law and civil society by the recent great transformations of the state system of Europe.

§ 51. Two other departments of public law—besides

the system of private law—developed also separately from, and out of proportion and connection with, its special doctrines, namely, the law of procedure, and criminal law. Both are parts of the law of public administration, regulating the action of the state directed to the preservation of the law, yet with this difference: the law of procedure embraces those rules which regulate the proceedings of, and have reference to the judiciary, and immediately bear upon the protection of rights by law; whilst criminal law proclaims that activity of the state, which is employed in punishing offences against the legal order, and in preventing its being imperilled. Owing to the importance attached to these functions ever since the most primitive state communities, the institutions of the law of procedure and of criminal law were the earliest to develop, and seeing that, in point of fact, these departments of legal rules were the first ones established as separate and independent departments, it was from them that, historically, the rules of private law, on the one hand, and numerous branches of public law, on the other, were derived; for law is generally recognized as such under the beneficent influence of social protection alone. Thus, for instance, the prætorian edict contained, properly speaking, only rules relative to the procedure of the prætor; but from these rules there were developed again a mass of *assured* rights, the so-called *Jus Honorarium*, and during the Middle Ages numerous institutions of law arose in a similar way, the activity of the state having been first employed for the purpose of maintaining the public peace with a view to the public interest; the establishment of the individual spheres of interest, that is, of private rights, followed only subsequently. These, having been already recognized, serve later on, at a more advanced period of development, as a new point of departure, and defensive state-intervention is then organized in conformity with them. Hence it is that, during periods of a higher level of development of the law, both the law of procedure and criminal law follow in the wake of private law, and adapt themselves to its system in

such a manner, that their subsequent scientific cultivation ensues in the spirit of the theories of private law, as may be perceived in the instances of the Roman law and of our modern systems of law, and thus it happens that we designate the rules determining the spheres of right—to use the expressions of modern science—by the term: substantive law, and those, referring to their protection, by the term: formal or adjective law.

§ 52. The system of international public law was also developed on the basis of private law, as a consequence of the hypothesis of the state of nature. Not, indeed, as if the notion or a system of international law might not have proceeded from other premises too. We find, on the contrary, that a doctrine of international law, based upon the Christian conception of the world and upon the traditions of Imperial power, began to obtain during the Middle Ages; for, starting from the notion of general human or at least Christian community, it was deemed possible to insure the highest human interests and to realize the ideal of universal peace within the organism of a single universal world-empire, within the sphere of which the subordinate states connected with it by feudal ties would freely develop—a doctrine which is most powerfully delineated in Dante's "De Monarchia." In consequence, however, of the crumbling of the feudal institutions, of the rising independence of the national states, and, finally, of the snapping asunder of the bond of common faith brought about by the Reformation, the illusory character of any system of world-empire soon became apparent, and we already find evidences of a change of conviction to this effect in the Spanish authors treating of international law before Grotius.

The hypothesis of the condition and law of nature—which in the hands of Hobbes and afterwards of Rousseau proved such a powerful solvent with regard to the established social order—showed itself with Grotius as the most effective aid to his creative genius. For, through Grotius' reasoning that individual nations stand to each other in

the same relation in which single individuals stand to each other in the condition outside of society, that is, in a state of nature, the law of nature became to him also international law. This reasoning has, ever since, remained authoritative with regard to international law, for by it alone it became possible to construct the modern scientific system of international law, and practically to adopt it, in spite of the fact that, since that time, no international legislative, executive, or judicial power has ever been acknowledged, nor is likely to be acknowledged, as long as our modern systems of state subsist. This circumstance furnishes us to this day with the most essential distinction between the structure of international law, and that of public and private law, and explains, at the same time, the intimate connection which has always subsisted between the cultivation of international law and that of the philosophy of law. As regards public and private law, it must not be forgotten, that science extended to them when their institutions—at least in their main features—had already been formed either by customary law or statute law, whilst the development of international law by means of customary law was preceded by the scientific system. After the peace of Westphalia, international law became, in consequence of treaties entered into by the different states, somewhat more systematic and positive in its character, analogous, in a manner, to that stage of development of law, during which positive law was enlarged by isolated and disconnected legislative enactments. The introduction of that period of international law, again, which would correspond with the period of conscious codification by the supreme power, as yet appears in the light of a difficult task to be left to remote posterity, whilst the development of international law is, in our own days, passing through the same stages which, in the history of the Roman law, may be discerned in private law at the period of scientific and professional interpretation. There is no doubt, that international law now derives its main strength from that public opinion which has obtained all over the civilized world, and pro-

claims that there are interests of a higher order than those of state, the assertion of which cannot but be instrumental, in its turn, in bringing about a fuller realization of those very interests of state. International law, accordingly, actually moves within the precincts of this public opinion, nor can its limits stretch beyond the boundaries of this sentiment. This explains why it has confined itself, almost to our times, merely to the spheres of states belonging to Christian culture, and why, even at this day, it is applied only in part to nations outside the pale of this civilization; and this circumstance further accounts for the fact, that international public law takes for its sole object that activity of the states which relates to such general human interests, concerning which a public conviction has already been formed.

§ 53. Of quite a different character are the historical antecedents of international private law, which originally was immediately evolved by the commentators, beginning with Bartolus, from the doctrines of Roman law, and was, at a later date, further developed by the civil law schools of France and the Netherlands, and continued to be cultivated down to modern times by those engaged in the study of private law. It presented itself, in the first place, as the sum of the rules, whereby questions of collision amongst local or non-imperial laws — *statuta* as distinguished from *leges*—of equal authority and effect were solved. In the next place, it was regarded as the theory of the limits of the territorial authority of laws entirely independent of each other, and not capable of being reconciled by a common supreme power. Finally, it was viewed as the department of those rules, which regulate the individual activity of a private character, yet relating to general common interests spreading beyond the boundaries of single states, and thus mediately bearing upon state interests also, and which, therefore, ought to be acknowledged and protected by every state. Hence it partakes of a threefold character: of that of *private law*, in being a rule in regard to affairs of a private nature; of that of *public*

law, in interpreting the limits of the authority of laws; and of that of *international law*, in starting from a consideration of interests identical with that on which international public law is based, and in being founded on the same kind of recognition which is conclusive as to the propositions of international public law. Thus it is *private law* by virtue of its principles and of the nature of the solutions it offers, *public law* by virtue of its aims, and *international law* on the strength of its historical development, its postulates and of the authority it asserts. Its form, too, is peculiar, for it appears as a definite and distinct system in science alone, whilst, practically, it always forms a component part of the positive law of some state, inasmuch as the sovereign power of the state sets forth the limits of the authority of the rules established by it, and likewise determines upon the recognition of the consequences of the enactments of other states beyond the territory where they originate, in consonance with the conceptions of the common interests of humanity.

§ 54. The logical connection of the four branches of the philosophy of law and civil societies does not, consequently, agree with their historical grouping. With reference to the latter, private law occupies the first place, whereas the former points to public law as that branch of law, the subordinated relations of which are decisive as to the connection of the rest. The very order even of the common fundamental principles assumes a different aspect when viewed from one or the other of the standpoints indicated above.

Taking our departure from private law, the subjective notion of right, in the character of an assured claim, and as an absolute attribute of individuality, or as the means of fulfilling duty to the absolute or the deity, is the result of the first and principal generalization. From this must be systematically developed the objective notion of law, as being the notion of the rule of order corresponding with subjective right; from the latter, again, the notion of the state as that of the community realizing law, and, finally,

the notion of society as that of an organization serving secondary aims within the sphere of the state.

This order is followed in point of fact by the authors who treat of the law of nature, and of the law of reason founded upon the ideas of private law, authors, who above all strive to determine the metaphysical notion of right by inferences from the nature of human reason. This order, however, must be reversed in the scientific sequence. Here the most concrete fundamental notion is that of society, embracing all the universal phenomena of human communities. From this may be deduced the notion of the state as that of the ruling form of a society. Objective law presents itself next as the will of the state, whilst subjective rights, as corresponding spheres of freedom, appear as its consequence. This gradation is the only one by which the intermixture of metaphysical postulates can be eliminated, and which, besides, reflects the natural connection of the phenomena, and not the historical connection of the doctrines. For this reason, this order will be hereinafter observed, as an order fundamental to the train of thought followed out in these pages.

BOOK II.

FUNDAMENTAL NOTIONS.

PART I.

SOCIETY.

CHAPTER VI.

SOCIETY AND ITS ORGANIZATION.

§ 55. The most general phenomenon, whence is derived the entire mass of relations discussed by the philosophy of law and civil society, is the social co-existence of men. Man has never lived, nor can ever live, isolated and alone, neither can any period of humanity be conceived in which man stood outside society. Such a condition is so absolutely opposed to human nature, that, even in that case where the necessity of a condition outside society was postulated as a matter of metaphysical hypothesis, its authors failed to substantiate it logically, even by drawing upon their imagination.

§ 56. The establishment of this fact, as being of universal validity, likewise leads to a perception of its causes. But the proper ascertainment of these causes necessitates a more general standpoint. Man is not the only social being in nature. The same disposition manifests itself in beings much more subordinate, nay, even in such in whom self-consciousness is not yet at all discernible. Without, however, referring to those animals which, owing to their mode of growth and increase, live together in material organic connection, and in whose case the individual can be hardly distinguished from its peculiar group, as in the case of corals and other zoophytes, we find amongst animals of a higher order numerous well-developed, nay actually organized, societies which, as in the case of ants and

bees, approach in many respects the constitution of human societies, and place before us the phenomena of division of labour, of the establishment of certain hierarchical gradations, and of conduct springing from a common interest with regard to some common task. Yet it is undeniable, that there exists no sort of causal connection between these last-named societies and those of mankind. Amongst those animals, again, which stand in a closer degree of relationship to man, social life shows itself more rarely and not so completely organized. But amongst these animals of a higher class there are also a great many who live gregariously, and certain relations of their social life show traces of organization, although of a very subordinate character. Thus, we there discover frequently the business of leading, watching, and giving signs of approaching danger allotted, for the most part, as separate and distinct tasks to particular individuals, and these cases afford us a picture of the manner in which permanent instincts arise from the modes and needs of life in conformity with the latter.

§ 57. Indeed, a more thorough investigation of the circumstances leads us, without any effort, to the conviction, that even in animal life society is the rule, and a solitary mode of life the exception. The former is produced by the natural increase of the species and its attendant circumstances, such as the attachment of the growing generations to their parents. It is maintained for the purpose of more easily effecting common defence or of securing collective existence, as in the case of herbivorous animals feeding in flocks, where one tract of land contains sufficient sustenance for a great many, or where, as in the case of smaller animals of prey, food is more easily obtainable by hunting in company. Companionship with fellow creatures suffers an abridgement, which gives rise to groups consisting of few individuals, or to an entirely solitary existence, in those cases only, where —as in the instance of large carnivorous animals—food is more easily procured for the individual than for the mass, and the individual has strength or other means of natural protection sufficient to sustain him in a state of isolation.

§ 58. The circumstances last enumerated do not hold good as regards man, and, without adverting now to his origin and to the question of inherited instinct possibly arising therefrom, it is therefore indisputable that, owing to his circumstances and to the postulates of the purely animal part of his nature, there are existent conditions which are all favourable to the furthering of the development of social disposition amongst men.

The weakness of isolated man, especially when he is quite rude and uncultured, the dangers menacing him from animals stronger than himself, and the difficulties attending the struggle against external forces, suffice of themselves to induce him as a matter of necessity, even in the most primitive periods, to act in common with his fellow men. To this must be added the influence of *habit*, the ties of which are naturally strengthened by the fact, that the weakness and defencelessness of the child unavoidably necessitates its remaining during many years with one of its parents, his mother, at least, and that, even on the lowest step of dawning civilization, there must have sprung up between man and woman from their dwelling together, though ever so temporarily, some sort of attachment of a more permanent nature. The struggle for existence, no doubt, proved also of eminent advantage in preserving those groups of humanity alone who were possessed in a higher degree of such social sentiments, as are the conditions of the security and development of mankind. Thus, social disposition descends from generation to generation, all the while ever becoming strengthened and expanded, and the necessity of, and capacity for, social life are both being simultaneously developed. Language and its concomitant, the faculty of generalizing—the most powerful means of human intercourse—have again the tendency to establish consciousness in the individual, and to lead on to the possibility and to the consolidation of consciousness in the community. Life passed with others, later leads — by virtue of this consciousness—to confidence in the division and combination of labour, at all events, with regard to the

most inferior and indispensable tasks, and thus confidence begets in turn sentiments and habits of mutual inter-dependence, which soon figure as the most elementary constituents of human nature. Our entire spiritual development from its most tender beginnings is thus most intimately connected with social life, and the tenour, form, and colouring of the whole chain of human needs and wishes, of human sentiments and ideas, is but the result of the incessant intercourse and combined co-operation of mankind.

§ 59. Since, therefore, every circumstance of human life affords fresh food for the social instinct, and as man is capable of development, owing to his faculty of generalizing and abstracting, and since, as he progresses, the occasion for, and the usefulness of, work go on increasing, and those who are endowed with a larger measure of social qualities constantly have the advantage over those with whom these qualities prevail in a lesser degree, it is but natural that the social disposition of man should constantly exceed the sphere of absolute necessity. This disposition is, as an instinct, thus at least coeval with the origin of mankind, and it precedes in date the intellectual recognition of its utility. The fact of its advantage being once established, tends to invigorate it anew, and results in human activity introducing combined action into a larger sphere, and in the more effectual assertion of the sentiment of solidarity. Hence, we can always distinguish two groups in the social relations of man; one, in which social co-existence answers some absolute need, and another, in which man is prompted to association, not by some immediate benefit or ascertained interest, but by his feelings, the gratification of instincts and feelings being invariably agreeable in itself, without regard to the advantage and object it may subserve. And, indeed, no matter how far mankind may have advanced, and to what extent its social organization may have become more perfect, or in what degree men have recognized the advantage secured by common action, however clearly they may have perceived those aims which can be obtained by combined co-operation

alone, or how decisively the particular features of the numerous relations and forms of human co-existence have been brought out into relief, there must always remain a sphere embracing such points of intercourse as do not correspond with any definite interest, but are responsive to an indefinite mass of inclinations, and to the gratification of human pleasure. And as man attains a higher level, as his consciousness becomes clearer, as his knowledge expands, as his rule over nature becomes enlarged, and as fresh objects of the disciplined division and combination of labour present themselves, these aims will always be drawn from that sphere, to which human intercourse extends by virtue of man's purely social disposition, whilst this disposition, again, invariably opens out new roads and domains of intercourse before unknown.

§ 60. If, therefore, those spheres of social co-existence which thus correspond with general indefinite aims and interests not clearly defined and fixed, may be called *society*, in a general sense, that mass of relations, again, which refers to definite aims and to absolute necessity may be distinguished from society in general as belonging to some *organic society*. For it is manifest that an organic society always arises from the indefinite spheres of society in general, and constantly encroaches upon its ground. Society in general forms thus in a manner the original matter from which definite societies develop, but which no social formations can ever exhaust; for, in proportion as one department of social relations comes to be embraced in a definite society, human relations simultaneously expand into new fields, and their mass, remaining thus undiminished, continues to supply nourishment and a foundation for further definite societies, to be called into life at a stage of higher culture.

§ 61. These definite spheres of society, then, which are properly called organic societies, present quite peculiar phenomena. The fact that these spheres are bound together by a conscious and certain aim, and by the necessities of life, produces great changes in the relations and concep-

tions of men living together within them. The connection of man with a society is invariably attended by an inevitable consequence, namely, the never-failing phenomenon of mutual inter-dependence, and of the development of corresponding sentiments, which, the larger the circle of interests grows which a society embraces—that is, the higher the level of culture is which those belonging to it have attained—become more and more intense. For combination in labour becomes necessary to the extent that it is divided; and to the extent of his employing the services of others man must unavoidably render services to his fellows. Whilst, therefore, the rude uncultivated individual, belonging to a society of a circumscribed sphere, and depending but only in a slight degree upon others, is able to supply only a few and primitive wants, and those, too, without any certainty, civilized man, bound by innumerable ties to his fellow men, is assured as to the satisfaction of his needs. Mutual inter-dependence, therefore, increases with the growth of a society, and human sentiments must also undergo a corresponding change. In man, in a primitive state, the feeling of unqualified selfishness predominates, and he asserts his individuality in every respect. He mostly stands face to face with external nature, which he is compelled to subdue, and as to which his acts are tempered neither by attachment nor by mercy; and, as he has no reason to expect anything subservient to his own interests from others, he himself is not disposed to make any sacrifices for theirs. But at the stage of a more advanced culture, when considerations of regard for others necessarily press to the front, and efforts for the benefit of the individual can only prevail in combining with those of others, a consciousness of the unavoidableness of this state of things is aroused, and from this tender shoot springs the growth of public sentiment. This ultimately appears as directly opposed to selfishness, although in point of fact it originated in it, and is but a nobler and spiritualized form of it. Indeed, public sentiment, like the social interests of men and human societies themselves, moves at first within narrow limits, and asserts

itself merely on more important occasions, when it may perchance rise to the heights of self-sacrifice. Later only, it adapts itself to the circumstances of wider communities, and appears, during the vicissitudes of everyday life, as an unbroken chain of the sentiments of self-restraint, of sympathy and of consideration and duty towards others, which gradually bring forth the fruits of mercy, charity, and, at length, of philanthropy, that readiness of self-sacrifice for general and remote objects, the ultimate ideal of which is that absolute abnegation of self, which the most exalted religions and philosophies proclaim as their ideal, and which is happily expressed in the word "altruism," specially coined by Comte.

Thus human interests and feelings are ever undergoing constant modifications and changes in a gradation, the first word of which is selfishness, and the last public sentiment; yet the intervening steps are separated by very slight shades of variation only. The more civilized mankind becomes, the more will man's sentiment ascend the scale of this gradation, and the more numerous will be the considerations tempering selfishness, and prompting man to seek his own advantage in harmony only with the promotion of public interest.

§ 62. The abrogation of the rule of selfishness, however, and the transition to public sentiment takes place but slowly, and only to a slight degree self-consciously, keeping steps, the while, with the organization of society which, although continually becoming more perfect, proceeds but by degrees. This is quite natural.

Every want presents itself at first merely as a vague necessity, afterwards as an instinctive propensity, and only later, after the lapse of a long time and the acquisition of due familiarity with the results of expedient practices adopted to its satisfaction, can it be conceived as a conscious and recognized interest. Hence the activity displayed in satisfying wants is at first of an instinctive character, and, becoming later a matter of habit and partly of reasoning, it selects its means with deliberation only in the measure

as its expediency is clearly recognized. As a further consequence of this, social relations become more and more definite, and the constitution of the society grows more organic in proportion as a wider insight can be obtained into the interests binding the society together.

§ 63. But human wants and interests being, as they are, of a great variety, frequently come into collision with each other in the same individual, excluding each other entirely or in part. Hence, if societies were formed on the strength of every recognized interest, their number would not only become endless, but the membership of the individuals belonging to each of them would be of a very uncertain and shifting nature. But as all interests are not of equal importance, those springing from vital wants soon become predominant, and the societies which cluster around these will be permanent, because the principal wants of men of equal culture living in the same age and within the same limits are on the whole identical. These permanent societies are naturally of greater importance, and hence, in the thorough investigation of social phenomena they have the first claim to our attention. In speaking of societies, accordingly, we may confine the expression of *society* pre-eminently to these, understanding by a society, in this sense, an association [illegible] together by the tie of some [illegible] interest. Such a society [illegible] with peculiar charac- [illegible] whole, is possessed [illegible] course of life of its

[illegible] organism to a [illegible] misunderstand- [illegible] employing the [illegible] exclusively to [illegible] is extremely [illegible] organism, and [illegible] attached to [illegible] accounted [illegible] such as this, for

instance, that the constituent elements of society could be dissected, in the same way as those of man, into nerves, muscles, bones, tissues, vessels, and cellules. If, however, we take the notion of an organic being in its proper and general signification, and reflect, that there is an immense variety of degrees and forms of organisms, all differing from each other, and apply this idea to the connection of the elements of society so far only—but to that extent exhaustively—as may be justified by actual traceable phenomena, we may obtain perfectly correct results. For, with regard to the constitution and functions of society, its elements are also inter-dependent in such a way, that the soundness and proper functioning of each depends upon the healthiness and corresponding working of the others. Each separate part feels any change or transformation in the destiny of all the others, and the direction and result of the activity of each is mutually conditioned by the activity of all the rest, just as the circumstances of society, as a whole, are decisive as to the condition of its own constituent elements, and as the character of the latter is again conclusive as to the state of the whole society. Besides, society does not consist exclusively and immediately of individual persons, nor is it a simple compound of its ultimate elements; but persons, and the things over which they rule, unite within it into groups of various character and degree, the combinations of which groups form, in their universality, the society, and present in their turn numerous intermediate formations, from the mutual inter-action of which the organic structure of society is developed. But, just as the organic condition is of various kinds and degrees in the case of various beings—different, for instance, in the Infusoria, whose whole body is homogeneous, and whose organs are infused through every part of their structure, and different again in phanerogamic plants and in mammals, the several members of whose structure differ from each other, and who are provided with separate organs and senses for every functi
task of life—so, too, is the composition of the ele

the societies of a lower order simple, uniform, and homogeneous, whereas an advanced stage of the society alone produces groupings of its various components, which so far conform to the different definite aims and changing circumstances of life, that special and appropriate members are assigned for the various tasks, whilst a separate organ of public consciousness and public will is also developed. Finally, to continue the comparison, just as the lower classes of individual organic beings easily submit to the severance of their substance—it occasionally even grows together again after having been entirely dissevered—whilst those of a higher order are more sensitive to mutilation, suffer more from the effects of physical injuries, and frequently perish in consequence, even so may primitive and less perfect societies be divided up without difficulty into several, or several united into one, whilst those of a higher order are less able to bear more violent injuries inflicted upon them, or operations cutting more deeply into the social body.

But, even as regards nutrition and reproduction, the characteristics of organic beings may also be discovered in societies. The latter are of a more permanent nature than the individuals who enter into their formation, yet are, like these, reduced to the necessity of continually attracting new elements, and of absorbing and assimilating them. And this holds true, especially, because every effort and labour of a society produces a corresponding waste of its matter, in wearing out the vital forces of the persons composing it, a waste which must be replaced and supplied anew. Every society, again, is only able to absorb elements akin to its own substance and which it can digest, as it were, as food. An individual, whose vital interests do not fit into the sphere of those interests which bind together a given society, cannot become its member, and, if violently retained, will not contribute to the enhancement of its strength, but will rather prove an impediment to harmonious social action and an injury, just as a substance, incapable of being assimilated, finding its way into an

organic body, proves to be poison to it. On the other hand, just as a society can in general spring up only where several subordinate societies have prepared its new life, so again can a society generally only be formed out of others of a similar nature, and its development and transition from one form into another can be effected by imperceptible stages only. In addition to this, every society—the number of whose members has grown, owing to their natural increase, so large, that all of them can find no place within it, and which, in consequence thereof, is compelled to emit swarms of emigrants, or to break up into parts, forming themselves again into independent societies—can give birth only to societies similar to itself. The several groups of a consanguineous society will, in their turn, be consanguineous societies, tribes will give rise to tribal societies, the colonies of communal states will themselves become communal states, and societies drawn from nations will, when settled in new quarters of the globe, again become nations.

§ 65. The main difference between societies and individual organic beings consists in this, that the component elements of a society are in themselves independent individualities, whilst individual organic beings cannot be so divided up, that each part taken separately can again become an individual in itself; and it is owing to this that the individuality of a society is of a different order from that of the individual man. This divergence is increased by the fact, that the consciousness and will of a society and the assertion of its individuality are not uttered through the totality of the society, as such, but can only be expressed through the agency of single individual members. Social consciousness and will can be formed from the consciousness and will of the individuals composing the society only through an abstraction; whereas, in the case of an organic separate individuality, the soul of the individual does not spring from the union of a distinct consciousness of each of its parts, but presents itself as an independent whole, corresponding with the sum of the functions of his life.

If, therefore, the individuality of a society, composed of independent individuals, is, in consequence of this difference, of a higher order than that of the natural individual, the tie binding together the constituent elements of the society is again much slighter—although no less real—there, than in the individual. For public interest, public consciousness, and public will, developed from them, are not simply the sum of the individual conceptions of the members of the society, but are accompanied by the expansion of these conceptions, containing, as they do, such elements as cannot be found in their entirety in any individual sphere of interest, and which, in the absence of the social tie, could neither have been formed nor recognized. Indeed, the individuality of natural individuals can be met with only in the more highly-developed forms of organic beings, for, in such as are of a lower order, we experience merely the presence of a vague and more general sentiency, from which arises only a disposition tending to adaptation to circumstances, whereas the capacity for clear will and consciousness can only follow the development of distinct organs and senses, the intermediaries of clear perception and thought. In societies of different levels, beginning with those spheres in which public interest and its attendant activity show themselves exclusively in the shape of the selfish aims and endeavours of some single individuals, and ending with those ideal constitutions in which the attainment of the social aim is according to the conviction of every member of the society a condition of his own prosperity, we likewise find a lesser or greater degree of ability to assert the consciousness of the entire community with regard to its situation, and to enforce its will in accordance with its circumstances.

The chief obstacle to the recognition of the individuality of a society lies in the familiar idea that, because a single person may, in exceptional cases, be able to exist independently and isolated, and frequently passes from one society to another, the preservation of the individual is independent of that of the society. This is a view still more corrobo-

rated by the artificial explanations proceeding from the school of the law of nature as to the origin of society, explanations founded upon the hypothesis of the condition of nature, according to which society was the result of a voluntary contract, entered into by individuals, who up to that time had been in no wise connected with each other.

But all these suppositions and explanations, drawn from phenomena developed in society and formed in the course of its existence, are, in their attempted application to individuals outside society, based upon an optical illusion. For, where a single individual maintains himself for a time against external nature, he owes his preservation to those qualities alone, which he has acquired through his education in society, and, where greater numbers of men are concerned, a condition outside of society can neither be practically proved nor yet even logically imagined. Voluntary association always presupposes discipline and capacity for organization, which are only the result of long social co-existence, and we can therefore as little conceive of it as a postulate in explaining the formation of ties beyond the pale of society, as we can the creation of a living body, by mechanically compounding it out of inorganic substances. The testimony of history, too, proves convincingly that in flourishing societies their members increase from generation to generation; whereas, when societies decay and crumble, their members perish together with them. Whenever, in the annals of humanity, mention is made of the loosening, or violent rupture, of the ties of some great social organization, it is always accompanied by the record of a corresponding decrease in the number of mankind; and even to this day we know of no other serious standard, by which to judge of the justness of any social organization, than by the ascertainment of the number of its members and of the increase in their wealth, their intelligence and their spiritual and material welfare. The isolated individual, therefore, no matter how complete and self-sufficient he may seem, cannot maintain himself independently and unsupported, and is, by very reason of his being, as in-

timately bound to a society, as are the separate cellules of an organic being to its whole body. For the separation of an individual from a given society prevents him from securing those principal vital interests, the benefit of which had attracted him to that very society. Those wants of his which he most strenuously endeavoured to satisfy can be gratified no longer, and, in consequence of this, he sinks from that higher level of life to which he could raise himself only whilst living within such social organization, and finds that the baneful results of his separation deprive him also of the possibility of gratifying other wishes of his. And this is natural; for the individual, who for the purpose of securing his vital interest, joins a society, that is, lives within its sphere, necessarily submits to the law of mutual inter-dependence, and becomes accustomed to the division of labour and to the rendering of services to others as well as to the expectation of services in return, and if he once stood outside of society, would have to renounce all these benefits, and being thus alone, would generally be unable to supply them. Indeed, the law of the differentiation of organs and functions applies in general to every organic being, and, for this reason, with the natural individuals as well as with societies, the capacity of action of their several members grows more and more one-sided and limited in its scope. It is true that the character of a vital interest, holding a society together, depends upon the degree of the development of the members composing it; yet it is not this last in itself, but the postulates of the former, which determine immediately the organization of the society and the expansion or contraction of its sphere. This latter, again, is the circumstance which is conclusive as to the question whether its members are obliged to make larger or lesser sacrifices in its interest, and whether their well-being is advancing or declining. That this is so, is proved in turn by the phenomena of the different phases of the course of life of societies.

§ 66. A society certainly does not spring up perfect and all complete, nor does it remain always the same and un-

changed. It is the result of development, passes through several phases in its separate course of life, and successively presents the spectacle of growth, of stagnation, and, finally, of dissolution.

Every society can, in truth, only start from the initiative of single individuals. Its transformations are the consequences of those relations which are formed between the individuals belonging to it, in conformity with the vital interest binding it together, as well as with the organization conditioned thereby, with reference to the conceptions and activity of the individuals. The origin of a society depends, properly speaking, upon the recognition of the vital interest forming its foundation. This process takes place, whenever, within the sphere of primitive undefined society, or of a society already established, some human want which has become of main importance at a certain period of culture cannot be duly satisfied. Hence arises general dissatisfaction, which, however, has, as yet, no definite and conscious aim, and hence a vague feeling of some want, occasioning various and almost instinctive efforts to effect changes in the established relations, and to transform them in conformity with the growing desires of the members, conscious in part only, and without being capable of taking a clear view of the results and consequences of the endeavours for the satisfaction of their aspirations thus aroused. Upon the minds of a few persons, however, a consciousness of those relations begins gradually to dawn, in which the securing of the vital interest forming their object is confronted with the existing circumstances; in this manner, there arises a corresponding ideal, as the fancied picture of the condition consequent upon the assertion of this vital interest. This ideal is subsequently proclaimed as an aim of life, and takes shapes more or less definite, until finally, after many fruitless attempts, it falls to the lot of some transcendent genius, who, inspired with enthusiasm, devotes his life to the realization of this ideal, to discover those internal conditions, involving the necessary spiritual and moral transformation of men, as well as those requisite

external conditions, which demand a change in existing circumstance and modes of conduct, and upon which the realization of the ideal may be effected. This is the part of the great pioneers of civilization, of the founders of moral, religious, and state systems, and of the originators of societies, who form the nucleus of crystallization, around which vague desires and endeavours, in a state of liquefaction, as it were, assume definite shape and organization. Frequently their labours prove vain, and the tender shoots of such an incipient society perish on an ungrateful soil, or are frowned down by unkind fate. But, if the interest, proclaimed as the ideal, be actual and vital, the effort to secure it will not cease. That happy concurrence of circumstances—the precise moment of which is indeed a matter of accident, and cannot be foretold, but yet which is always sure to come, whether sooner or later, with regard to wants of a permanent value to humanity—will arrive, when success will crown the efforts, the scattered seeds take root, and a permanent sphere of society will open out for such, as recognize that particular interest as the substratum of their lives, proclaim apostle-like its principles, subordinate their practice to its demands, and accept the ties and the mutual inter-dependence necessary for the attainment of its ideal. Thus the first sphere of the new society is formed. Its principle presents itself as the vital interest peculiar to that society, and, corresponding with it, public interest and a certain, although narrow, structural organization is at the same time called into existence. The subsequent growth of the society depends afterwards upon the degree of attraction exerted by the vital interest forming its common tie, and upon the accession of larger or smaller masses of individuals to its sphere.

These new elements may not all of them at once clearly recognize the importance of the society, but they instinctively contribute to its success, whilst the immediate followers of its founder, and the heirs of his vocation, are themselves becoming more and more imbued with a clearer consciousness concerning the task and circumstances of the society,

the necessary amending and completing of its organization, and the conditions of its development. Already at this early stage of the consolidation of a society, however, some class distinctions are apt to arise between its leaders, who are possessed of definite consciousness, and who are the exponents and representatives of public interest and public will, and the mass of its members, who are guided in their conduct by indeterminate feelings, and by sentiments of piety and willingness towards those at the head of affairs. But in all of them there becomes gradually developed, consequently upon their self-adaptation to the demands of the new society, that discipline and sense of co-operation, without which the maintenance of this their co-existence, and the proper division and combination of their labour, would become impossible. Yet, as soon as a new society has been thus formed and developed, it must unavoidably engage in a struggle against all those conceptions, habits, and inclinations which have sprung from selfish interests hitherto gratified within the established spheres of the antecedent dominant society; for it is only by slow degrees that new modes of proceedings, new conceptions of life, and the new directions given to activity, which now appear desirable, will replace the habitual ones which derive their main strength from selfish acquiescence in the existing state of things on the one hand, and from the indolence which follows tradition on the other. The phases of the struggle greatly differ, and they are more or less varied and protracted, according to the importance of the new vital interest, and to the greater or lesser proportions assumed by the transformations occasioned by the novel social organization. The fulness of time, however, at length arrives, when the constitution of the new society becomes thoroughly established, and its principle is looked upon by general admission as one of first importance amongst the generally conceivable vital interests of the age. At this stage the new society assumes its ruling garb, now presenting itself as the state, in which form it realizes and maintains the conditions of its existence and development

as *compulsory law*, on the basis of public consciousness, and by means of the public will and force.

§ 67. The society, however, having become a state, has not yet ended its course of life. It is compelled to employ force as long as there are turbulent elements opposed to it, which do not attach themselves to its principles, nor recognize their share in the interest forming its common tie, nor yet adapt, of their own accord, their conduct to its conditions of life and to its law. But gradually the consciousness of the benefits derived from the society grows common property; tradition and custom next sanction and facilitate the proper means of action, and the necessity for asserting its authority by force becomes more and more restricted, when the voluntary co-operation of every constituent element is insured by the circumstances above mentioned. Thus gradually does the necessity of external coercion for the purpose of upholding the fabric of the society vanish with the development of the internal ties, and a society reaches the highest point of public utility and renders the participation in its blessings by all those belonging to it most complete, when its organization—founded no longer on the compulsion of law, but on universal public conviction—includes the widest sphere, compatible with the nature of its fundamental principle, and with the vital interest, forming its centre, with which the individual vital interests of all the members have become identified. Henceforth its part as an independent society is done, and it ceases to exist as a separate individuality and organization; for, as a matter of course, some other society of a wider sphere and of a higher order has meanwhile become dominant, a society within which it takes its place merely as an organization of self-government, and, later, as one resting upon the security of private law alone.

CHAPTER VII.

THE MUTUAL RELATIONS OF THE SOCIETIES.

§ 68. With the development of man, interests too change. Increase in knowledge, a more rigorous discipline, and a higher capacity of organization show the attainability, desirability, and necessity of aims, which, in periods more remote, could not have been conceived at all. Hence, new kinds of vital interests and new kinds of societies arise, whenever a society embodying some vital interest has become completely developed, and the activity conforming to its conditions has become part and parcel of the nature of those belonging to it, and has thus grown almost instinctive with them. But men, unequal in capacity, consciousness, will, and self-command, are no less unequal in their development, and consequently the vital interests of individuals living in one and the same sphere may diverge and tend towards various societies. One individual alone even may cherish various vital interests, and thus at one and the same time be attracted to different societies. This gives rise to the phenomenon, that vital interests of various orders and societies of various orders, with relation to one and the same sphere, may simultaneously arise and thus occasionally collide. For the spheres of these societies do not simply touch, but frequently intersect each other, and this in a hundred ways.

§ 69. Naturally, the order of a society does not depend upon the degree of its development and organization, but upon the order of the vital interest which has produced it. The different orders of the vital interests are again determined by the degree of connection in which they stand to

the individual interests. In proportion as such a special vital interest presents itself as the sum of more concrete and fewer, but more pressing and direct, wants, it will be of a lower order, and more able to unite a mass of less cultured individuals. The social circles forming around it will also be narrower, but these formations will likewise be more universally present in the earlier period of human development.

A vital interest of a higher order, on the contrary, being, as it is, of a more mediate character, requires for its assertion a greater number of antecedent evolutions, a greater capacity for co-operation, and a more complicated organization, and may become the centre of societies of a wider sphere and embrace a larger number of members; yet, as it is only accessible to those who have attained a higher degree of culture, we meet with it in fewer places in history.

§ 70. A vital interest and a society of a higher order may, therefore, embrace the totality of an interest and of a society of an inferior order; for, indeed, the development of the latter always precedes the formation of those of a higher order, and serves as their foundation. But, conversely, a fully developed society of a higher order cannot be fitted into the sphere of a society of an inferior order; it will check parturition as long as its position remains subordinate, and its members are as yet unable to triumph over the lower society, and to bring about the complete victory of their own recognized vital interest. It does not, however, follow that, where a society of a higher and one of an inferior order oppose and contend with each other in one and the same sphere, the former will invariably come out victorious. Societies in their contentions do not derive their main strength from the objective value of their fundamental principles, but from the attachment and tenacity of the individuals adhering to them. That society, therefore, will prevail, which is relatively the most important, whose central vital interest satisfies the widest range of the most strenuous endeavours at a given period, and within a given sphere, and whose conditions of existence are consonant

with the consciousness, discipline, and organizing capacity of those composing it. In a word, at the point where as yet but few are capable of appreciating the higher interests of life, and where but a small minority are so constituted as to answer the requirements of a superior society, a society of a higher order will be compelled to remain for the time being within the limits of a society of a lower order, and to develop only to the degree allowed by the order of such an inferior society. That society, however, which groups itself around the vital interest of a preponderating force—no matter of whichever order it be—becomes, in triumphing, the dominant society, the society of the state, until another society representing interests of greater import again gains the upper hand, and, putting an end to its dominant position, remands it to an inferior station, a process which in the course of the regular and uninterrupted development of civilization is invariably attended by the victory of interests of a continually higher order.

§ 71. The dominant society of the state contains, accordingly, within its circumference twofold subordinate societies, namely, those whose rule has already declined, whose development had been of anterior date, whose sphere is more contracted because of their inferior order, and whose principle, consequently, may still at any time be conveniently and fully asserted within the province of the aims of the higher dominant society; and those again, which, being of a higher order than itself, are still in course of preliminary development, and are able to assert but in part as yet their vital interests in opposition to the dominant vital interest. The dominant society is engaged in constant struggles against the latter, for they are, from the nature of things, fraught with danger to the future of the dominant society; whilst, as to the subordinate societies that have declined from rule, there is no further occasion for contention, because their full protection is even more assured within the sphere of the higher interest of the existing society, than at the time when they themselves were dominant; for the dominant society now assumes

also instead of them the struggle against hostile elements, and permits them to dwell in peace within its precincts. Since then, the dominant society of the state expresses the conditions of its own existence in its rules of law, and asserts them in the order established by it, the subordinate developing societies present themselves as hostile to the law, and as imperilling the actual order. Subordinate societies of an inferior rank, on the other hand, appear as secondary agencies of the social order, and as placed under the protection of the law.

These circumstances determine the forms assumed by the various subordinate societies within the sphere of the dominant society. The attitude assumed by a society of a higher order in the course of its development is—owing to its inability to secure its interests duly side by side with those of the dominant society—antagonistic to the interests of the state. The spheres of its interests, therefore, standing outside the protection of the law, seek to assume such forms as might insure their toleration. Hence they appear as voluntary private combinations and associations, secluded at first as much as possible from publicity, and are only able but gradually and slowly to organize according to their proper claims, in proportion as they have attained a condition of developing powers of resistance such as to oblige the dominant society to come to terms with them.

Societies whose rule has declined, on the contrary, preserve, to a great degree, their own organization, as far as it can be fitted into the sphere of the dominant society, and even present themselves as convenient organs for the purpose of assisting to realize on behalf of the dominant society, and within their own spheres, tasks, which pass beyond their proper aims. Consequently, there still attaches to them a public character, not indeed that of state-spheres, but of spheres of self-government, and in this manner they are supports and pillars of the existing order. Hence we find that several such subordinate societies frequently range themselves by gradations and degrees under the dominant society as spheres of self-

government, until at length the lowest correspond with some vital interest, long since secured, of such a general nature, and the conditions of which have become so simple, that for the purpose of securing the co-operation of their members they demand from the dominant society no other aid but that of private law; on the other hand, however, they themselves have ceased to be direct sources of strength or organs on behalf of the state, and figure merely in the domain of private rights unreservedly abandoned to public liberty.

§ 72. It is, therefore, manifest that, with the exception of the most primitive societies, no perfectly simple and homogeneous society can in general exist, and that every dominant society is compelled to yield up a field within its own sphere to numerous societies of a higher and lower order, which stand in various relations to it, and have but one feature of resemblance amongst themselves, namely, their common subordinate position.

To the superficial observer, and in the ordinary use of language, the boundaries of these different subordinate societies merge and resolve themselves into a general unity, and thus society in general appears as a notion contrasted with that of the dominant society of the state, whilst, as regards the latter, its character as the state is the only one taken into account. But as the state itself is only one of the phases in the course of life of a society, and every state is inevitably only the form of some dominant society, the subordinate spheres, in their turn, also represent only some other formations of various societies; the semblance of their external unity being produced merely by the common frame of the dominant society embracing them, and likewise defining their limits.

All these societies are engaged in constant struggle amongst themselves, each of them strives to attract to the service of its own principle the individuals composing the sphere of the dominant society, and to shape their conduct in conformity with the conditions of its proper existence. The order and the law of the dominant society of the state,

meanwhile, sets limits to these forces which threaten it with dissolution, and maintain that temporary state of balance between the subordinate societies, which results from the proper relation of the vital aims of various orders to its own vital interest, and to the conditions of its own existence, and which corresponds with those prevailing conceptions and those capabilities of co-operation, which, for the time being, best answer the intellectual and moral qualifications of its members. It is owing to this reason, and to one which is closely related to it,—that the force of attraction of the various vital interests is brought to bear upon the members of one and the same sphere,—that the limits of subordinate societies assume that apparent indistinctness, owing to which it is only close observation, and the analysis of phenomena, that enables us to clearly recognize the diverse factors, otherwise seemingly homogeneous, which in truth produce within the dominant society incessant currents of formation and dissolution. The strength of the society of the state is taxed to a considerable extent by fulfilling this its task of ruling, subjecting and reconciling the various subordinate societies, although as to each of them in different degrees, and it is exactly this circumstance that determines its conduct with regard to each single subordinate society. Thus, no great display of power is needed in the management of those societies which either are just passing through the first phases of their development, or which, already long ago reduced to subordination, have quietly settled down in their proper spheres. The most serious struggle the dominant society has to maintain is, on the one hand, with societies as have developed to such an extent that they themselves are already striving for rule; and, on the other hand, with such as, having just descended from their dominant position in the state, are not yet conscious that the rule has irretrievably passed away from them. Hence, those moments which cluster around the circumstances of ascending to, or of declining from, rule are of the greatest importance during the life and formation of societies. The clear recognition

of these moments, however, requires more particularly a thorough investigation of the constituent elements of societies.

§ 73. Besides the internal contentions between the dominant society and the subordinate societies, there is yet another struggle going on within the sphere of each of these societies, between the members respectively attached to them, with regard to their participation in the advantages resulting from the vital interest of their respective societies; and this individual rivalry between the members of each society adds considerably to the complications arising from the mutual contentions of the societies. All struggles between the societies can no doubt be ultimately reduced to a strife of individual forces, only that through the social organism these forces are combined in public consciousness, public will, and public power, and that, accordingly, in cases of the struggle of different societies, their antagonistic members contend with each other not singly and immediately, but only indirectly. The interest of the individual is, indeed, through all the phases of this struggle, identical with that of the society of which he considers himself particularly a member; for the selfish individual, who looks but to his own interest, and tries to shirk public duty, does not thereby ultimately advance his own benefit, but only that of the members of the competing society. Owing to his egotistical conduct, his proper society is not able, as against the other societies, to display the strength it might otherwise have put forth, and is thus less prepared to assert its own principle, nay, is even compelled to adapt itself to the requirements of a vital interest of a nature different from his own. The self-sacrificing individual, on the contrary, whilst he apparently yields up his own advantage, increases the chances of his own welfare and of that of his fellow members, in that he contributes to the assertion of his chief vital interest. But in the struggle in which the members of a particular society within the pale of their own society engage, for the purpose of securing for themselves the most advantageous position in

connection with the conditions of existence of that society, individual considerations and forces are strictly and directly opposed to each other. This struggle, however, assumes importance in the contention of the various societies in one respect only, namely, in the fact, that the individuals who are most thoroughly imbued with the consciousness of the conditions of life of a society, and are best fitted to adapt themselves to the requirements of its social life, are able, by fulfilling the duties of social leadership, at the same time to secure most completely their own interests. Thereby the services rendered to the society, and the rights obtained and enjoyed within that society, become so intimately connected, that they can be but temporarily separated from each other, and even then, only to such injury of the society, as is sure to recoil before long with evil consequences to the privileged members themselves.

§ 74. These phenomena are all the more important, as the consciousness of, and devotion to, the vital interest, and consequently the participation in the public consciousness and public power of a society, are of necessity unequally divided amongst its members. And the more the sphere of the society expands, and—during the various phases of its struggles with other societies—stands in need of singleness in the direction of the forces at its disposal, and of a consistent and uniform settlement of its law and order, the greater will be the difference in the parts assigned to the members of the society, and the fewer, in proportion to the mass of the members, will be the number of those who possess power. Accordingly, as the ratio of the consciousness of the members is continually varying during every phase of the development of the society, the manner of expressing it and the external structure of the society, change too, in analogous fashion. The most remarkable transformations that take place in this respect coincide with the period at which some particular society becomes dominant. For, at such a moment, the sphere of the society widens, and the number of its members increase out of proportion to the spread of the consciousness of its

principle, and to the degree in which the ability of adaptation to its requirements can gain ground, since the society at that stage absorbs others by force, and establishes the authority of its law over such persons, too, who, owing to their own conceptions and aims, are, from the nature of things, as yet unable to feel any attachment for it. The degree of consciousness in a society which has but recently obtained rule, seems, in comparison with its sphere, slighter than the proportion possessed by it shortly before its accession to dominion, although it has actually increased rather than decreased. The true reason for this apparent change consists in the fact, that the consciousness has become confined proportionately to a smaller portion of the mass of the individuals belonging to the society. In this way only can the formation of aristocracies and of privileged classes, which being better fitted for the performance of some essential social services were also obliged to render these services in their own interest, be explained. But, as soon as the rule of a society is established beyond all doubt, and has become unassailable, such privileged conditions must cease, because the reason for them has also ceased from the very instant, that the services due to the preserving vital principle are equally incumbent upon everybody, and as soon as every member of the society has equal rights amongst the conditions of its existence, owing to the establishment of its law and order.

§ 75. This starting up of such privileged conditions, and of their merging again into the general level of society, of the consolidation of aristocracies, and of their absorption by democracy, the conspicuousness of inequalities and their abolition, does not, in fact, run quite regularly and smoothly, but is intricate and complicated, owing to the struggles between the dominant society and the subordinate societies, and to various societies attaining the rule by turns.

The aristocracy of societies in the course of development, which assume the rule and organization of the state, is not in the main composed of those elements, which took the

lead and enjoyed the privileges of the society preceding them. For the aristocracy of a given society cannot, in general, be dissatisfied with the existing order, since those who fully agree with the principle of the dominant society, and who, in the service of its vital interest, stand at its helm, altogether attribute less importance to such aims as cannot be satisfied within it. But few of them are disposed to give up their advantages in favour of a new society, of a yet uncertain character, and to promote its organization; although dissatisfied aristocratical members generally take the lead in revolutions. A progressive developing society, on the other hand, usually owes its origin to such persons who, although familiar with the aims and conditions of the dominant society of the state, strive after higher ideals, the attainment of which they cannot hope for within the actually ruling society. They are joined, for the most part, by individuals recruited from the class of the poor and oppressed, who value but little those advantages which are afforded by the existing order, even though it constitute a decided progress upon the antecedent condition of things, and who prefer to place their hopes in what may be realized in the future. Hence, since the aristocracy of a society is always composed of its most energetic and conscious members, the privileged of the new society array themselves against those of the antecedent society, even if derived in part from their body. They have an additional advantage over the latter, in the enthusiasm arising from the heat of attack, which in its momentum is always superior to the devotion displayed in mere defence; and they are all the more hearty in their onslaught, seeing that they occupy a more privileged position with regard to their own society, than the established aristocracy of a society more settled in its character, and now gradually melting down.

But, again, when the new society becomes actually dominant, and, in transforming the former society of the state into its mere organ, absorbs and assimilates at the same time a large portion of its organism, while as yet unable

to create an independent body of law and an order of its own, the members of the former aristocracy obtain, under these circumstances, a chance to maintain their customs and traditions as far as they conform to the new state of things, and, by amalgamating to a great extent with the new aristocracy, to assert their privileges and influence during the new era also. This accounts for the continuity of aristocracies, which is one of the most striking phenomena in history, and which would menace humanity—especially in periods of higher culture—with an almost permanent division into two classes, were it not for the effect of counterbalancing agencies, which disturb this continuity. Amongst these agencies may be enumerated the constantly widening sphere of public sentiment, giving unceasingly fresh impulses to democracy; and, further, the circumstance, that the varied interests of different societies necessitate the employment of a great variety of abilities and furnish spheres of action for which the members of the former aristocracy are, by the character of their inherited capacity and dispositions, naturally less qualified than are the fresh elements. To this may be added that, parallel with the development of mankind, the average level of man's intelligence becomes also raised, and that, with the heightening of the intensity of progress, its influence upon the masses also gains ground more rapidly; and, finally, that the inherent power of the abilities, as well as the development of individuals, endowed with conspicuous qualities, always increases in conjunction with the enlarging of the scene on which they arise, and in which they are called upon to assert themselves and to play their part.

§ 76. An insight into these agencies permits us to infer what connection subsists between the degree of development of societies and their circumstances and form of government.

At its origin a society invariably contains all the three elements from the seeds of which monarchy, aristocracy, and democracy spring. The initiative of the individual, imparting its first impulse to the formation of every society,

leaves behind it memories of a monarchical character, and furnishes the principal argument in justification of monarchies arising at subsequent periods. The champions, heroes, and martyrs of the early periods of a society are the germs from which its future aristocracy sprouts; for, although privilege is at first conferred on personal merit only, yet, in the course of centuries of struggles, the traditions of leadership create a compact class, which frequently grows to be exclusive. Finally, the mass of believers and followers, who by their accession constantly enlarge the sphere of the society, form its democratic element; an element which, during its most primitive phases, manifests voluntary devotion to individuals who become conspicuous in the common ranks, and which only subsequently, and by slow degrees, awakes to the consciousness of its rights and obligations when more complicated situations arise, consequent upon the contentions between different societies. This element can only attain power when the relations and the structure of a society have become quite clear and translucid, and when no difficulty is experienced in generally recognizing and adopting its general conditions of existence. Hence the government of every society is, in its course of transitions, at first of a monarchical character, and only much later adopts a democratic character; it is aristocratic during the periods of the struggles of development, especially in case of the greater vehemence and obstinacy of these struggles. The moment, however, that an aristocratical society becomes dominant, it changes again permanently into a monarchical society; partly because it needs a uniform leadership as long as the question of reconciling the new and old conditions of its existence is not yet determined, and partly because its principle requires an individual representation and expression in confronting those new members who have been unwillingly forced into its sphere, and can be kept there only by dint of coercion; and, finally, because the habit of, and the taste for, strict discipline, which has been acquired during protracted struggles, have prepared the minds for

obedience and feelings of loyalty towards a person embodying the sovereignty. Again, the government of a society that has been dominant for a long time becomes democratic, but it degenerates into despotism whenever its existence is threatened by the springing up of a new society. At all events, by dangers of an unknown character, and amidst circumstances of difficulty, a tendency is produced to resort to extreme measures in order to avert peril; thereby mistrust of all the modes hitherto practised in the direction of the affairs of the society is engendered, and the ground prepared for the absolute rule of some single individual, which rule, founded as it is on no principle corresponding with the regular organism of the society, conforms merely to accident and convenience.

Accordingly, the form of government obtaining in a given society does not depend so much upon the elements dispensing public power, and their intentions with reference to its formation, as upon the circumstances of the societies, and of their constituent elements; nor do its changes depend upon the character of the anterior government, but upon the degree of social development. The difficulty of determining the laws governing the changes thus taking place becomes even greater, if we take into consideration those structures merely with which we meet in the dominant society of the state, and which stand out therefore as forms of state-government. Their sequence does not consist of separate phases of a uniform course, but of different and independent developments of societies relieving each other in governments, and ranging themselves side by side. Thus external agencies—not connected with the essence of these developments—are of importance with regard to their sequence. Such factors are, for instance, involved in the questions, whether some particular society has attained to rule after a hard and protracted struggle, or after a short and easy contest; whether the conditions of the assertion of its principle and of its law and order have already been effectively prominent or not; what amount of exertion it requires, to follow the clue to the mazes attending the cir-

cumstances of its existence; whether it remains dominant for a longer or a shorter period; and, finally, whether its elements settle down in peace, or whether, continually disturbed in their rest by ceaseless contentions, they are subjected, as it were, to the effects of continual fermentation. The possibility of the forms of government being logically developed from each other, and of their describing a regular cycle, is moreover interfered with by the fact, that the dominant societies are not only obliged to contend with subordinate societies within their own sphere, but that they live, in addition, in a state of active rivalry with other ruling societies existing at the same time.

§ 77. The dominant societies do not indeed exist isolated from each other, nor are their spheres unlimited. The circumstances of mankind are too varied, its development is too unequal, and the assertion of the different influences of the diverging relations of external nature too great, to admit of any identical vital interest being generally of equal importance at one and the same time; and this is true of all humanity. Hence, societies of an entirely different character develop simultaneously in different places, but in course of time there nevertheless arises the possibility of mutual contact and mutual action and reaction upon each other between these different societies, and hence of mutual contentions. Yet, if even within the same sphere of civilization there prevail identical ideas and endeavours, and the attraction of the respective fundamental principles of society prove of equal force, this circumstance affords no certainty that, in consequence thereof, any single society will arise, having a common sphere corresponding with that of the common principle, for generally several societies of of the same character develop side by side. There are many reasons for this. In the first place, although a number of people living in different parts of a large territory may have attained the same level of civilization, they must be still subject to be differently influenced by divergent external circumstances. Then, again, societies are like individual organic beings in this respect, moreover, that

their proper size and limits of growth are determined, not merely by external agencies, but by the exigencies of their internal organism. In the last place, public power and public consciousness, answering the vital interests of any given society, can increase and assert themselves with growing effect only so long as the possibilities of intercourse and mutual interaction between the members of that society exist. For, as soon as it oversteps these boundaries, the society, the vital interest and common bond of which is deficient in due strength, becomes enfeebled, and breaks up into parts. The external limits of a society depend, accordingly, upon the nature of the vital interest forming its common bond, upon the character of its organism, and upon the degree of its development, and, besides, upon the efficiency of the means of material and mental intercourse it has at its disposal at a given time; but at no time can its sphere be enlarged to such an extent as to swallow up every other society devoted to the same principle which it acknowledges. It is owing to this, that history always presents dominant societies of an identical character, and which acknowledge the same vital principle, and that not singly, but in clusters.

Every dominant society is therefore surrounded by two different kinds of societies, both such as stand upon the very same foundation upon which it is itself built, and such as differ from it in principle. Between these societies the external form of intercourse is regulated by international law, but at the core of all these relations, in whatever guise they appear, there is sure to lurk some jealousy and matter for contention. Where the vital interests of neighbouring societies are not of a kindred nature, their opposition must grow irreconcilable and absolute, and the struggle can only terminate with the subjection of one of the contending societies, that is, with the reconstruction of the one worsted, in conformity with the principle of that neighbouring dominant society, which has proved the stronger of the two. The rivalry of such neighbouring societies as own the same principles, on the contrary, finds

its limits in the consideration of those principles common to all of them, which form the cherished common property of a certain period of civilization, and are publicly proclaimed as ideals of higher standing than the single objects of the several kindred societies, states, and nations, and as dominant ideas of mankind. Hence arise the different standards applied by international law in struggles of a various character; and hence, also, the attempt to maintain an international balance of forces within the precincts of a system of civilization which embraces states and societies founded upon identical vital principles, whenever the public conviction becomes general that, in endeavouring to expand to the injury of the others, they expose themselves to the danger of possibly undermining their own internal order, and of imperilling their common conditions of existence.

§ 78. The unavoidableness of internal and external struggles, as indicated above, produces also a great effect upon the inner life of societies. It imposes upon every society the fulfilment of a twofold task; firstly, the care of providing the means, the employment of which should enable it to secure the vital interests of its members; and next, the keeping up of its strength, and rendering it available for the purpose of maintaining its organism against other societies.

The former function embraces the industries of peace and the production of material and moral resources, whilst the latter necessitates measures of defence and eventually of attack, thus embracing the arts of war.

Both these functions are indispensable to every society, in whatever condition and at all times, but their respective importance varies considerably. This must be especially noted, for the performance of these different functions entails upon the society results widely differing in their character.

Military activity demands an organization which can be subordinated to the guidance of a single will, which will render it possible for its inherent forces to be concentrated at any moment and to be employed on any side; an

organization which requires strict external discipline, and which, necessitating as it does commands conscious in every respect—absolute directions issued from above and blind obedience rendered from below—necessarily leads to the centralization of the government of the society. The activity of the central power, accordingly, continually expands in a society of a preponderatingly military character. Even the tasks of production, which have to be fulfilled according to the exigencies of war, are subjected to immediate official control. Such a society always endeavours to find within its own limits, so far as possible, all the means of satisfying its own wants, and, fencing itself off against its neighbours, becomes more and more exclusive. Moreover, owing to the fact that the authorities absorb all important business, and that individual activity is thus restrained in every respect, the spirit of initiative wanes in individuals, whilst the inequality of the social classes goes on increasing and is ossified in a hierarchy of military grades. A society, on the contrary, in the life of which military activity plays but a subordinate part, and where the economical activity of the members predominates, attempts to assert the conditions of natural competition from the standpoint of the cheapest possible production, and of the most advantageous disposal. Such a society, moreover, by affording securities to public liberty, develops the inclination for individual initiative, and brings into prominence the features of individual self-reliance, and thus does not permit any expansion of the central power beyond the point at which this might be indispensable to the preservation of the society. In this way it affords room for self-government, whilst, owing to the various individual efforts continually counterbalancing each other, its order is being established almost unconsciously on an ever broadening basis of equal rights.

Thus two antagonistic types of social organization become formed, to each of which every society conforms in turn, according to the stages of its development, and indeed even at one or another period of its ruling stage, according

to its requirements as an independent state. The circumstances which are decisive in this respect turn upon the questions, whether a society is larger or smaller in extent—for the larger the sphere of a society, the fewer will be the points at which its foreign wars immediately effect the mass of its members—what character its intercourse bears to neighbouring societies, whether its vital interest is identical with theirs or differs from it, whether these societies are of equal or unequal strength, and, finally, what is the kind of organic structure with whose postulates its own form of government is in closest harmony. But as all these agencies mutually interact upon each other, it follows that the explanation of the actual phenomena of any society always presupposes a precise knowledge of the degree of development of that society, of its dominant or subordinate relations to other contemporary societies, of its form of government, of its connection with surrounding external societies, and of the organic type of its structure.

CHAPTER VIII.

THE SOCIETIES IN HISTORY.

§ 79. The historical application of the theory of societies demands, in the first place, an indication of those several vital interests around which mankind has grouped itself, and towards the realization of which its strength is employed. This, however, would seem to imply the enumeration of all the principal wants and wishes, and of all their possible groupings. These groupings are apparently innumerable, and yet, for theoretical as well as practical purposes, a comprehensive classification, embracing them all, is not so difficult as might appear at first sight. The great mass of human wants and wishes, although continually appearing in new forms and combinations, has in one or another form been immanent in man, ever since the first dawn of history, and remains unchanged in its ultimate elements to the end, through all the phases of civilization. Moreover, human nature itself undergoes a transformation, though only by slow degrees, and in the course of this process new wants arise, or rather pass from an inchoate and dormant state into full consciousness. Hence it becomes obvious that vital interests and fundamental principles of societies must not be understood as meaning merely single and isolated human aims, but that they are in reality connected clusters of interests, differing from each other less in their number and variety than in the mutual proportion of the elements entering into their composition, and owe their peculiar significance and colouring rather to the relative preponderance of one or the other of these elements, than to their positive number,

which remains pretty much the same, and increases only gradually as civilization advances. As a consequence, the leading vital interests differ also from each other by reason of the relations in which they stand to the conception and views of the world ripe at a given period. Thus sociology is able to follow psychology in its method. In the division of mental qualities into a few principal groups, science, in spite of their highly composite character, starts from the proposition, that the difference of ideas and emotions observable in different individuals arises relatively but in a slight degree from the difference of external influences and impressions, which are on the average identical or very similar with everybody, but may be rather traced to the various modes in which they are associated, and to the results arising therefrom. In a like manner the bonds of human community can be resolved into a few groups of a conspicuous character, and their great variety recorded in history may be reduced to a few principal types, by adopting a classification, in which the characteristic peculiarities of the conception of the world current at given periods, and of the various degrees of culture are accepted as a basis for the division, due regard being paid to those modes of activity and of satisfaction of wants, by which the endeavours prevailing during those given periods are principally and immediately engrossed. The sum of interests exhibiting these peculiarities figures thus in every case as a chief and independent aim, while the subordinate and secondary wants and wishes only appear as modifying them more or less. These propositions hold true in spite of the fact that more than a single conception of the world may obtain with a body of individuals attached to some vital interest affording a foundation for a society, and that such a body does not always attain the same level of culture at all times and places. For the measure of man's rule over nature, and the degree of the attendant human consciousness are connected in such a way with the social relations of men and their capacity for organization and discipline, and the mental and moral qualities of men as

well as of communities are so inter-dependent, that the influence of uniform motives and modes of activity upon character and upon the ideals ensuing from them, fixes identical limits to the several societies composed of individuals subject to those influences and to the complex currents of ideas which regulate their further development.

In this way the various views of life which may casually start up within all the societies attached to a particular vital interest resemble each other much more closely than those based upon identical theoretical principles, but presenting themselves in societies different in kind. The direction in which any system of civilization advances, is invariably connected with the character of the fundamental interest of the society representative of it; whilst the degree to which culture attains, always corresponds with the degree of the development of the society in which it prevails, and is therefore apt to be developed by means of the fullest maturity of such a society; although in the case of societies of a lower order, their civilization, too, can, under the most favourable circumstances, rise to a but low level. Hence the divergence between the results of human endeavours during different periods of history and with different populations is incomparably greater than that between the pains they have taken and the physical and mental exertions they have made to advance their objects. For success, for the most part, depends not upon the quantity of power employed to ensure it, but rather upon the purposes towards which the endeavours have been directed; that is, upon the importance attributed to those aims in connection with the rest of the interests of human life.

§ 80. Hence, the series of vital interests and spheres of society afford the spectacle of a sequence, in which the conceptions, the conduct and the co-operation of mankind are being adapted to the requirements of those ideals of humanity which figure as its leading aims and correspond with its wants of a progressively higher order. Accord-

ingly, the incipient phases of development acknowledged the mastery of such a vital interest as was capable of being asserted within the most primitive, the most universal, and the narrowest, but yet the most completely intimate, sphere—a vital interest only to be realized in absolute community of life, and such as can only be conceived within the narrow limits of consanguineous ties, and within the confined, but closely-cemented frame of the society of kinship. This is followed by the aims to be realized within the sphere of local contiguity, and which, in addition to the postulates of external security and of conduct conforming to rules of traditional usage, alike consolidated during the predominance of the ties of consanguinity, also require the establishment of conscious and individual division of labour and of a sense of harmonious life; thus calling into existence the tribal and the communal society. Subsequently, the interests involved in the amassing of wealth for consumption, in selfish conquest for plunder, in the indulgence in luxury and in the gratification of the sense of power, become overwhelming, and in the society of conquest seek food for a greed of enjoyment knowing no bounds.

The impossibility of allaying this hunger for unlimited power over others, on the one hand, and the burden of oppression, on the other, give rise, again, to ascetic aspirations; and now the religious interest, striving after other worldly ideals, assumes a concrete form in the structure of the ecclesiastical society. The energy and self-reliance, however, manifesting themselves in the qualities embodied in nationality, which create the national society, find themselves soon cramped in the austere and confined domain of the ecclesiastical society. The empire, again, which the national society, through the agency of science (perfected by independent investigation, and by the free formation and expression of convictions), acquires over nature, seems—whilst producing an instinctive sense of a general harmony of interest—to promise a future satisfying of all the economical demands within a society of a still larger

sphere than that of nationality; there seems to be held out the prospect of an era, although distant and uncertain, fondly looming up through the hopes of all times and nations, in which it will become possible to fully realize the moral ideals of mankind in the bosom of a universal society of humanity embracing and assuring the fulfilment of the loftiest of human aims.

§ 81. All these fundamental principles of societies, and the societies clustering around them, become successively, and in turn, dominating; the evidence of history, the highest tribunal of corroboration, thus bearing witness to the inferences of theory. History is a testimony, however, to which systems of the most opposite character are in the habit of appealing; as a rule, even the boldest and most abstract system of metaphysics gladly accepts, for the purpose of illustration, examples taken from the vicissitudes of mankind. But here, where it is not a question of reasoning based on principles asserted to be independent and standing above experience, but one of inquiry as to whether the propositions deduced from the concrete attributes of human nature do actually correspond with the phenomena disclosed by the entire past of mankind, the comparison of the result of this inquiry with history must be effected in quite another way, and from a different point of view. We are not permitted to proceed arbitrarily, and to explain the facts in the sense of the theory; we must prove beyond a doubt that the theory, in its classifications and principles, does actually correspond with the groups and links of the phenomena; and whenever the two are found to disagree, and history speaks more forcibly and with a clearer voice than the theory, the latter must yield and submit to correction.

True historical proof distinguishes itself from the arbitrary use of historical instances in this, that, whereas, in the latter proceeding, only a few cases tallying with the theory to be supported are taken into consideration, proper historical induction takes in as far as possible the whole range of all the phenomena; brooks no exceptions,

and claims to be perfect testimony only if it succeeds in showing that the evidence thus obtained is both in harmony with novel and seemingly inexplicable phenomena, and capable of illustrating them; the phenomena thus elucidated shedding, in their turn, a new and instructive light.

A fundamental difficulty in the way of this sort of corroboration by facts of our present theory is presented by the observation that, to the cursory glance, the changes occurring in states are not seen to follow everywhere the changing sequence of the vital interests and of the societies attached to them; nay, that in certain states, the societies respectively embraced by them, as well as the fundamental principles forming their common bond, do not admit of being clearly distinguished. In reality, however, there is nothing in the claims of the theory to justify such an objection. For the society of the state is never constructed strictly in conformity with its own principles; the character of its form is always influenced by the reaction experienced from the subordinate societies, and especially from that subordinate society which has preceded the actually dominant society in ruling, and the organization of which has been appropriated by the latter on its becoming dominant. And as, in addition, it undergoes further modifications in its connection with neighbouring dominant societies surrounding it, we can as little expect the society of the state to exhibit in its concrete phenomena merely such agencies as have entered into the reasoning of the theory, as we can, for example—to use a scientific instance—by previous calculations trace the actual orbit in which any heavenly body moves, though it may be approximately anticipated. There are other causes besides—such as violent conquests, the exhaustion of nations, the contact between cultures of various degrees and tendencies, and their mutual interaction, the perishing of civilizations which are either effete or confined only to a few privileged persons amidst an overwhelming mass of savage assailants, and the alternations of the phases of intensive and extensive

progress—which make it clear, why the history of one people, or of one polity, cannot simply mirror back the necessary sequence of vital interests and societies.

These considerations help us also to understand why the progress of historical development is liable to be interrupted; why the number of societies which have become stationary at a certain point, and have then perished, is much larger than the number of those which have emerged into a level of a higher order,—especially if we take into account that, throughout all nature, beings of a lower order are uniformly and, in general, greatly in excess of those of a higher, and that, if we consider the mass of living creatures, we find, in the world of organic life, specific development to be only exceptional. They teach us also, finally, why, in the investigation of the chain of the general connection of events, we must trace the facts affording a clue to the correct theory through the whole length and breadth of universal history; passing step by step from country to country, from people to people, and from period to period. Indeed, the higher the order to which the law of causality under investigation belongs, the wider must be the corresponding area of observation.

§ 82. The most primitive period of humanity cannot be the object either of actual experience or of immediate memory; nor can, therefore, its leading vital interest, as well as the organization corresponding with it, be discovered by direct observation. It is true, that isolated fragments of mankind, which seem to be in a perfectly savage state, exist even to this day. Numerous accounts given by classical authors, and by writers of the Middle Ages, are still extant, in which pictures of portions of mankind in a similar savage state, and at times in even a ruder condition, have come down to us. The facts, however, which are thus placed at our disposal are already tinged by the views of the narrator, and were, moreover, obtained under circumstances which preclude the existence of an original condition, as they everywhere relate to periods of contact with more developed societies, and to cases, where this

contact has already produced its effect upon the primitive condition. An evidence of this will be found in a deeply-rooted theory supported by zealous and respectable advocates, that the condition of savages, as observed in the past and at present, is but the consequence of a relapse from a previous culture, which, although higher, may yet have been primitive. This relapse, although, in some cases not probable, can hardly be denied in others. In any case, however, it warrants no inference running counter either to the general law of development resting on the authority of biology and psychology, or to the assumption that the original state of mankind was entirely rude. Indeed, we find, amongst all cultured nations, without exception, vestiges of features which are only referable to a savage state, thus proving the latter to have been originally universal and not accidental; for every relapse necessarily leads back to a condition similar to that prevailing previous to the higher development. All mediate, historical, and genetic proofs refer us back, besides, to a lowest possible condition of mankind, as having been everywhere its most primitive state, a state in which there could hardly have been even a trace of intellectual means of intercourse, and of the faculties of the human mind connected with them. The community then established could not, therefore, have been founded on any other ties but such immediate material ones as nature asserts between the sexes by means of sexual instinct, and between succeeding generations, in consequence of their mutual dependence upon each other. The ties of consanguinity, therefore, have their direct foundation in the claims of the animal nature of man, but their sphere originally hardly extended beyond the temporary cohabitation of man and woman, and that of mothers and children, whose dwelling together was unavoidably of a somewhat longer duration. The inadequacy of isolated human forces, however, in grappling with the agencies of external nature, with the hardships of climate, with wild animals, and with the task of procuring food, as well as the necessity of simultaneously

attending to domestic and outdoor labours, and the indispensableness of constant watchfulness and readiness for defence, whilst, at the same time, production, to meet the most primitive needs, had to be attended to, very soon enlarged these mutual relations, and rendered them more permanent. The kinship, therefore, was the first society, already historical, consisting of a group of blood relations, in the composition of which only differences of age, such as that between children and adults, and differences of sex, such as that between man and woman, could be distinguished. Instances of this condition have survived to this day, and that it was at one time universal is amply proved by a great mass of collateral evidence. Thus, the society of kinship enters, as an integral element, into the composition of every society of a higher grade; and, therefore, must necessarily have been independent at some previous time. Again, the connection between the various formations of kinship is in itself an indication of the fact that they are derived from one common source; namely, from such institutions as must have owed their existence at some remote period to the exclusively dominant position and state-organization of the society of kindred blood. Finally, the whole sum of the vital interests and capabilities for association developed at a later period, can be traced to those least complex ones which could properly have taken root only in the primitive society of kinship. But the kinship or family here spoken of by no means resembles, in every respect, those which, under the same name, but in a widely differing signification, form part of the societies of a higher order at later periods; nor do they correspond exclusively with the spheres of those institutions which have survived in history as the most developed and dominant forms of the society of kinship by blood. In the case of cultured nations the tie of consanguinity appears, in fact, merely as the bond of a monogamous or, at most, of a polygamous family; and, from the days of Homer and Plato down to our own, it is the prevailing opinion, that the most primitive orderly

organization of human community was the patriarchal, where only one head of the family, the eldest ascendant, ruled over his wives, his progeny, and, occasionally, over younger relatives of lateral branches. But, although it is undeniable that the patriarchal society is the most perfect dominating form which can be developed on the basis of the consanguineous tie, and that most societies of a higher degree can be only formed out of it, yet it is equally certain that the patriarchal society itself is preceded by numerous antecedent stages, which prove its derivation from a considerably more primitive state. To determine with any precision the exact order of these antecedent stages, or to attempt a strict classification of the organizations corresponding with them, seems rather a matter of difficulty; especially if we consider that the forms of primitive social, as well as of primitive individual, organisms are fleeting, indeterminate, and extremely variable. Indeed, as regards the primitive starting-point of humanity, the writers on anthropology themselves disagree; some of them asserting utter promiscuity to be the primitive social condition, whilst others deny its universal applicability to mankind, and set down certain fixed limits appearing in the relation of the sexes amongst the features even of the animal nature of man.

Notwithstanding this, an approximate picture of the sequence of the organization of social spheres founded on consanguinity may be obtained by the light of those general phenomena which establish, that the more fully developed the consanguineous society becomes, the more complex its organism grows. Thus we observe, that the distinctions between the degrees of relationship—founded at first on the fact of birth, and traced through mothers alone, and established only later with reference to the male progenitor, on the strength of his being either the begetter or of his physical superiority—increase in course of time in number, and become more and more rigidly circumscribed. In connection with the nicer distinction between the degrees of relationship, there arose, partly from the practice and

from the associations leading up ultimately to *exogamy*, and in part, no doubt, from the results of natural selection, the notion of incest, attended by prohibition of marriage within a progressively widening circle of degrees. The community in women, and necessarily in men also, was gradually confined to narrower limits, until at length it developed among endogamous peoples—that is, among peoples marrying within their own sphere only—into marriages between groups of brothers and sisters, and of similar clusters of relatives, and, later, into *polyandry;* and, in the case of exogamous populations—that is, such as marry outside their own kinship, class, tribe, or "totem"—into *polygamy*, in the generally accepted sense, and subsequently into *monogamy*.*

Hand in hand with these gradual changes, there can be traced the transition from a condition lacking every vestige of domination and leadership, to one where individuals—who for some reason or other had become conspicuous in the varied vicissitudes of life, the strong, the experienced, the old, and such as were distinguished for mental qualities of an uncommon order—enjoyed privileges founded in part upon

* Although the facts relating to the practice of *exogamy* are derived from all quarters of the globe, and much evidence corroborating the practice of *endogamy* has been collected and is still continually accruing, no theory has as yet succeeded in explaining all the phenomena of the development of the idea of kinship and of the laws of marriage, especially as to the extremely obscure questions relating to endogamous customs. For example: Have they ever been universal, or were they only restricted to a few populations? Were they not perhaps with these exceptional, and followed only by the aristocratic classes and the ruling dynasty? For it is a noteworthy fact that, in almost all cases of endogamy mentioned by the classical authors, amongst which those of the Egyptian and Persian dynasties are the most remarkable, this practice relates more especially to ruling families, and, though it may have been a survival, it evidently points to traditions of relationship traced through female descent, which, the later developed ideas of relationship through males having been superadded, may have led to the desire of assuring legitimacy in accordance with both systems; and this was, no doubt, further enhanced by religious myths and the demand for pure blood, derived without a flaw from the original stock of reputed Divine descent.

tradition, and not requiring for their assertion a renewed effort on the part of the privileged in every fresh case. This, again, was followed by a higher state of things, where the social tasks attending the exercise of power were entrusted to the hands of those alone who were conspicuous for their descent, or for services rendered or anticipated, until gradually, in a widening sphere of kinship, more strictly regulated descent in the families formed the condition of rule, paving the way for the development of the patriarchal system as properly understood.

§ 83. The development of the organism and of the forms of the consanguineous society involves also a transformation of the economical character of the activity of its members, in addition to the modification of their emotions and habits, and to the formation of ideas and morals. The thoroughly precarious mode of life shifting helplessly, in the strict sense of the word, from one day to the next, and absolutely dependent upon external incidents, is by degrees exchanged for the occupations of fishing and hunting. To these are added, according to the circumstances, either nomadic pastoral life, with the growing importance of which the former pursuits become merely secondary; or agriculture of the most primitive kind; and both these occupations are attended by the practice of employing prisoners of war as slaves.

Thus we gradually arrive at the notion of a sphere of relations by blood, and of kinship or family, which recognizes also strangers in the subordinate condition of slavery as members. An agency of dissolution is thus introduced into the consanguineous society, whenever the patriarchal power becomes absolute, and its proper members, as well as the stranger slaves, have consequently sunk to the level of equal subordination as regards their common master. From this follows the possibility of the slaves raising themselves in other respects also to equality with the others, especially if the institution of adoption, which has meanwhile become developed on religious grounds, has opened the way for admission, under exceptional circum-

stances, of strangers amongst the proper members of the society. Nor must it be forgotten that the formation of religious notions undeniably runs parallel with that of more complex social spheres. Man saw reflected in external nature, and in those of its manifestations which exert their influence upon him, but which yet lie outside his own spiritual self-consciousness, his own passions, experiences, expectations, and power. At first he looked upon such external objects and occurrences as his own counterparts and equals, as liable to be subjected; later, he conceived them to be more powerful than himself, yet, owing to the possibility of appeasing or subduing them by mysteries and conjuration, capable of being employed in the furtherance of his own purposes. Subsequently, when the sphere of the social tie had somewhat expanded, man viewed familiar places and phenomena in the same light as he did his belongings, and invested all these phenomena surpassing his individual strength with a divine character, the attributes of which he simply formed by the exaggeration of human ones. The auspicious divinities connected with his own social sphere, and protecting it, he placed into opposition to the hostile and strange divinities; for, in his worldly relations also, he conceived everything which was strange, and which lay outside the narrow sphere of his own ties, as at once dangerous and hostile.

The social and religious relations and ties are always, therefore, of an entirely kindred nature. The respect paid to terrestrial sovereigns and to divinities, and the services rendered to them, are of a like nature, differing, at most, in this, that the divinity claims indiscriminately the services of all the members of the society, but can be approached only by those belonging to a privileged class, whose mediation must be obtained by those of a lower class when they wish to conciliate superhuman powers; while human rulers acknowledge limits to their own authority as members of privileged classes, but are accessible to all. On this account the exercise of religious power, and an exalted, often a leading, position in the hierarchy of a

society are always intimately connected. Thus religious agencies, in addition to the influence of unconscious adaptation, contribute to create that habit of obedience, and that discipline with regard to matters of tradition, which formed the great moral result of the consanguineous society, and by the influence of which the selfishness of savage nature in man was first checked; thus affording an indispensable condition of all further progress; although it cannot be denied that the same influence also contributed to the formation of obstinate conservatism and headstrong clinging to the accustomed state of things. The development of self-restraint depends after all upon the possibility of external discipline, and the former is, in its turn, an indispensable element of all capacity for broader organization. The rooted traditions, the ceremonies and conventionalities, in which the results of primitive discipline were embodied, contain the embryo germ from which morals and the notion of normal and proper conduct have in process of time sprung.

With the growth of these there becomes awakened a sense of comparative security, and the taste for a peaceable mode of life within the society. Man now learns to trust in the members of his kinship, and counts upon the benefit of mutual defence, in exchange for the trouble and sacrifices required of him in common with the others, of the necessity of which, as against neighbouring stranger—and therefore hostile—societies he himself is convinced. Every contact with the latter must, as a matter of course, have been of a warlike character; for these hostilities arise not alone from the necessities of constant defence, but are also prompted by the advantage anticipated from offensive warfare, the object of which is to seize the property of the stranger and to exterminate the neighbouring societies. During these ceaseless struggles, blind obedience to superiors, discipline, and observance of tradition become more and more firmly rooted. The first manifestations of a rising public spirit will have ripened into the attachment the members feel for their own society.

§ 84. These very circumstances, however, caused the

consanguineous society to expand into the tribal society. The conflict never could have been confined to a single enemy; it must have raged between many simultaneously. The inevitable result was, sooner or later, that the surviving members of several groups of kinship, which had either been vanquished and partly destroyed, or disintegrated, made common cause against a common enemy, in spite of the fact, that no actual ties of kinship had really existed between them, although a supposition of consanguinity of some kind, resting entirely upon imagination, was sure to follow shortly their union and co-operation. It happens, also, that several weaker groups unite against a common enemy superior to them in strength, or that, for the purpose of defence or attack, a group will try to draw additional strength from its own slaves, and with a view to securing richer booty, eventually confer upon them equal rights with its members, and receive them into its sphere.

The society of kinship, in which the blood has thus become mixed, in consequence of the stages of development above indicated, may, however, under favourable circumstances, expand by natural increase to such an extent, that the common conviction that its bond of union was formed by consanguinity rests upon mythical traditions rather than upon actual memories. Henceforth, the society ceases to be one founded exclusively on the tie of consanguinity, that of local contiguity taking the place of the former tie. The society itself is thus no longer one of kinship, but a tribal society. Yet the smaller spheres of consanguinity—to wit, families, houses, clans, and in general such groups of kinship as bear a more compact and exclusive character—still occupy a place within it, and for a long time to come continue to figure as elements in themselves, independent of the new and enlarged society.

The sphere of interest of local contiguity presents itself accordingly as the natural development of the sphere of consanguineous interest, and differs from the latter, at first, not so much as to its internal contents, as on account of the modified conceptions concerning the new tie of the

society, which, in point of fact, gives rise later to a change in its actual contents also. Men, after experiencing that groups of different origin may unite and co-operate—nay, that, owing to natural selection, populations happily blended apparently developed more vigorously than those of absolutely pure blood—no longer looked upon a common origin as the exclusive and main bond of society. In spite of the fact that their ideas were still in many respects interwoven with the customs of their particular sphere, and that the more intimate ties, especially religious sentiments, were still asserted with reference to the sphere of consanguinity, men founded their basis of community in acknowledging, amidst the same local circumstances, identical customs and traditions, in combined economical activity, and in taking, with united strength, measures against common enemies. The more permanently they have settled down, and the dimmer the memories of the kinship of the consanguineous society, consequent upon the new direction of activity corresponding with the new needs of life, become, the more surely do their conceptions thus become altered. If, therefore, the tribal society presents itself in its beginnings as a group of families, among which, instead of the actual original kinship of blood, merely its tradition has survived, this tradition likewise gradually ceases, public opinion being swayed by the knowledge that elements not consanguineous have been actually fused into a single group, and thus the recognition of the interest of local contiguity obtains by degrees even with half-roving populations, whilst amongst people permanently settled it leads to the formation of the communal society.

Notwithstanding the fact, however, that the society founded upon local contiguity is never the simple expansion of the consanguineous society, and that it never arises merely from the natural increase of a single sphere of kinship, but is always the result of the dissolution and amalgamation of several different consanguineous societies, every such society shows itself, not isolated, but in the company of other societies resembling it. Its connection

with such similar societies is loose and undefined, but is, nevertheless, of a permanent nature, although never assuming a strict and formal character, and manifests itself, for the most part, only in a certain dim sense of community, and, at certain times, in common religious notions and rites.

This wider sphere always embraces an ethnic race, which is characterized by certain natural features common to all its members; such are, a common language displaying merely divergencies of dialect, kindred shades of conceptions springing from language, myths and religious views of a fundamentally common character, as well as a similarity in manners and institutions. Hence, only such an explanation will properly account for the transformation of consanguineous societies into societies of local contiguity, as is also able to state the causes of the phenomenon of the formation of ethnical races, and of explaining why it is that these races in themselves never develop into independent societies, but only into such spheres of local contiguity, as constitute their several parts. However, if the agencies at work in the consanguineous society, as well as the reasons of its dissolution are taken into account, these phenomena, which seem so perplexing, appear simple enough.

During the process of the enlargement and amalgamation of the consanguineous societies, that sphere of kinship which, in the new tribe, proves to be its strongest element, always assimilates the rest to itself, and, in like manner, amongst neighbouring tribes founded upon the supposition and tradition of the ties of the consanguineous society—though not upon its fact—the more tenacious will, under the pressure of common external circumstances, leaven the rest into a resemblance with itself. Especially will this be the case if, in proximity to each other, they are subjected to the vicissitudes of a wandering life, extending over a longer period of time, and to the influence of one tribe surpassing all the rest in numbers, strength and ability, without, however, being able to transfuse them into one common sphere. For, at this early period of humanity,

the effect of spiritual agencies and the uniformly modifying force of identical external circumstances far exceed the capability for organization. The tie of consanguinity could no longer serve as a sufficient centre for the societies claiming more extended formations. Local interests could only serve as a direct bond within certain narrow limits, and, consequently, although the natural elements of community asserted themselves over a larger sphere, they were not as yet sufficient to produce the forms of those compact societies which, at a more advanced period only, arise on the basis of nationality. They presented to view merely a cluster of smaller societies—akin to each other and resembling each other in many respects, yet varying in form from that of the patriarchal to the most developed forms of communal society—which from time to time may have been prompted to friendly intercourse by a kindred tongue, religious belief and kindred conceptions, or may have been exceptionally forced, especially against foreign elements, into short-lived alliances, but amongst which, in other respects, a regular state of war—a natural consequence of their situation as neighbouring societies—was kept up; a condition which, on a lower level of civilization, generally assumes the character of fierce and internecine struggles.

§ 85. The formation of the societies of local contiguity, as well as the interest forming their common bond, point to their origin as developments from the higher order of forms of the consanguineous society.

The patriarchal society bears a distinctly monarchical character; the chief of the tribal society is, it is true, less absolute, but still exercises monarchical power, and owes his position to descent, although descent must be coupled in this instance with talents for leadership. This power, however, declines in proportion as the consciousness of the interests of local contiguity increases, and as the members of the society also claim—to the extent in which their actual co-operation in the accomplishment of the social tasks and their inventiveness and advice amidst the adventures of the roving life and conflicts are required—the right of having

a voice in the determination of enterprises which interest them and which can be carried out with their assistance alone. And whenever it happens that, owing to the increase of the members of a tribe, the more daring and energetic enter upon distant ventures—the tribe thus sending forth swarms independently seeking booty in new countries, where they often find a more comfortable life and where they sometimes form into independent tribes—in such cases, even if the chiefs still continue to be exclusively of princely blood, the aristocracy formed out of their followers claims a share in power and in the fruits of the labour of the conquered population, which later forms the mass of the people.

This is the origin of the societies of the Heroic Ages with which we everywhere meet at the dawn of history, and where the three ever-present elements of all societies, the monarchical, aristocratical, and democratic elements, again figure in their separate spheres. The chief becomes prince and, later, king, but in this case it is indispensable that his descent by pure blood—often traced by tradition to the Divinity itself—should connect him with some head of the antecedent consanguineous society. The aristocracy, too, is proud of its descent, but its memories and purity cannot be traced back beyond that conquest or colonization, when personal distinction took, in great measure, the place of birth. The people, the remnants of those who had been subjected, but who, owing to their large numbers, are allowed to live in a condition superior to that of slavery, often preserve in their customs and manners traces of a distinct antecedent tribal society and even of one of kinship, which had been their original sphere. The king figures as the mediator of Divine Power and as the mouthpiece of Divine Will; the subordinate chiefs and nobles, the descendants, for the most part, of the former heads of families, have an important share and often a decisive voice in the councils. The people also obtain some degree of influence, whenever the upper classes need their co-operation in the struggles against

stranger-societies, but this influence manifests itself as yet chiefly in the popular assent or dissent of the armed masses; below these, again, we find the multitude of those, who are still wholly or half-enslaved and are not recognized as capable of bearing arms. The outlines of the mixed form of government show themselves here for the first time, and become more sharply defined and more distinct, in proportion as the tribes settle down more permanently, and, by extending the pursuit of agriculture, develop into a separate people.

§ 86. The societies of local contiguity assume forms of a much higher order, whenever, in the course of their progressive development, they add foreign intercourse and commerce to agriculture. Some tribes haunt the water-courses of the larger rivers, and seize upon the control of the commerce which a wider sphere of wants and an increasing demand for luxuries has produced. The desire of advantageously disposing of the goods piracy has hoarded up along the sea coast, prompts to a resort to the safer and steadier methods of commerce. At points naturally suited for centres of communication, and which also usually mark the boundary lines of several tribes or distinct populations, there arise, under the protection of religious sanction, marts, the seeds of future city-communities, the inhabitants of which are of a mixed character, and bound together merely and exclusively by the interest of local contiguity. The organism of such presents in its beginnings the characteristics of the kingships of the Heroic Ages, and fictions, as well as a growing mythical tradition, soon supply their several groups of lower rank with the lacking tie of consanguinity. Peaceful intercourse abroad and treaties with foreign peoples, sanctioned by the solemn rites of religion, soon obtain an equal significance with the ventures of war, and thus the conscious promotion of interests of an economical character becomes one of the vital tasks of the society.

The ties inherited from the consanguineous society now grow daily less important. The first victim of this trans-

formation was the monarchy, resting on patriarchal tradition, which was soon supplanted by the rule of the nobles, that is, of the heads of the subordinate spheres of the society formed after the models of the societies of kinship. The divisions of family and kinship lose their proper meaning within the communal society itself; for in the complex and agitated intercourse of life, especially in regard to the social tasks and the state of the public law, the ties of consanguinity cease to be of leading importance, and their place is taken by the territorial groupings of the members of the communal state, based on local considerations alone, which groupings, although they at first run parallel with the divisions of kinship, finally expel the latter from every domain, and, in the end, from the domain of religion also. Consequently, the privileges of the aristocracy dwindle down, the barriers separating it from the people crumble one after another into dust, and the equality of the freeborn citizen in the eye of the law gains more and more ground, until, at length, democracy obtains the upper hand in the most powerful municipal states. The struggle next ensuing between the democracy and the aristocracy is not merely a consequence of democratic principles and aims, but presents itself as the decisive moment of the final victory of the interest of local contiguity over the traditions of the society of kinship, which have still survived in the aristocracy.

The democracy of antiquity consisted of but an inconsiderable portion of the inhabitants, in comparison with the entire mass of the population and with the number of strangers, freedmen, and slaves; but by degrees the rights of citizenship came to be obtained upon easier terms, and neither descent nor wealth, hitherto always connected with them, any longer constituted the conditions of complete social membership and influence, which now became, more and more, strictly the reward of individual energy and individual services.

§ 87. Hence, the notions of political liberty and equality, and the formation of institutions embodying them, originate

at first in communal states. There is no trace of the formation of higher ideas in consanguineous societies, and even individual consciousness does not appear well defined there. The inferior members of the society were completely subordinated to the heads of families, and these, in their turn, were the slaves of superstitions entertained with regard to supernatural forces and to the divinity, and the slaves of custom and tradition; and along with the consciousness of the community of the society there existed as yet no independent consciousness of personality, but merely a vague sense of individual separateness. In the tribal society, on the contrary, the feeling of the value of the individual strengthened with the nobles, and assumed inordinate proportions with those who embarked in martial adventures. Yet the boundless self-reliance and passionate feeling of independence, which are the characteristics of barbarians living in tribes or entering upon distant enterprises, are not qualities befitting the circumstances of permanent societies. These rude qualities were softened down, however, by pursuits, to some extent peaceful, which attached the members of the society to fixed spots. So, in the case of tribes, with whom the pursuit of agriculture predominated; whereas, in the communal societies, they were tempered by attachment to the native soil and the institutions to the growth of which man had himself contributed, and by that ready subordination founded on the firmly established public morals, the memories of the glories of the past, and the hopes of welfare connected with the future of the community. Hence patriotism, this highly spiritualized embodiment of public sentiment and of ready self-sacrifice, which is much more absolute and general in its nature than attachment to family or kinship. Hence arose the conception of the social order, as the result—not of rigid natural relations or of Divine commands—but of conscious human contrivances; and hand in hand with this conception go the ideas of individual rights and liberty, which show themselves capable of spreading and of being equally shared in by the citizens,

especially those rights of liberty, under which the individual claims his share in the management of every affair, but which, in their turn, require the unconditional subordination of every individual to the public will. No matter therefore to what extent the consciousness of individuality in the communal state develops, the state itself, and the will and power of the community, form absolutely and in every respect its impassable barriers.

There is, however, another idea connected with the conception of order—that of harmonious beauty satisfying the spiritual sense. Accordingly, the ideal of the aims in communal societies was always conceived of as ordered harmony, evenly proportioned and balanced in all its parts, upon which the perfection of individual life as well as the beauty of the products of human industry are dependent; whilst the state again presented itself as an artificial structure, the organ for satisfying conscious human wants, and as capable of being constructed and perfected.

In the communal state, consequently, independent science, art, and statesmanship first develop. Here civilization was first able to attain a higher level, and to advance towards aims self-consciously marked out—aims perfectly identical and equally prominent with regard both to the entire community and to its individual citizens. For, owing to the inconsiderable number of subordinate societies, the individual citizen and the state stood much nearer to each other, and their common bond of interest seemed much more conspicuous, than is the case in states of later periods. This gave rise to that homogeneity in the internal life of the communal state and its culture, which frequently, and to such a great degree, surprises the observer accustomed to the complex phenomena of modern societies, and which manifests itself in the importance the communal society, from considerations of state, attributes to the tendency and means of education. And this holds equally good of every communal society, whether it endeavour to realize the idea of harmony in the consolidation of order and in the regularity and precision of the external modes

of life, or in the cultivation, perfectly harmonious in every direction, of the individual faculties and dispositions. In any case, however, the facts, that the organism and spirit of the communal state so far resembled the individuality of its citizens, that the state appeared to be but an enlarged picture of the individual, that the interests of the communal state, being local, were exclusive and assumed consciousness as antagonistic to the interests of the surrounding societies, and that these interests were capable of being extended to every sphere of life which could then be conceived of—patriotism and religious sentiments being herein intimately connected—inevitably led to a single endeavour; namely, to render the communal state absolutely independent and self-sufficient, and to enable it to meet all its wants through its own agencies. This endeavour was, in fact, never realized, but always remained the permanent leading idea of the theory then developed, and of the practice then followed.

§ 88. Hence, however, arose the inclination to expand, an inclination which could not but be fatal to the common bond of interest and to the very existence of the communal state. For, whenever the sphere of the power of the communal state widens, and its dominion extends to other spheres, which it can on no account receive into its own frame, and whenever the power over these is exercised exclusively in the interest of the conquering community, and not in that of the subjects, its object can only be extortion. This, again, involves such an organism, and demands such functions on the part of the citizens of the conquering community, as render it impossible for them to act their natural part within the communal sphere; especially as aspirations and sentiments are thus aroused within them, which are at war with the proper conception of conduct due to their own country.

It is on these grounds that all the political writers of ancient Greece lay such great stress upon the number of citizens in the state being limited, so as to prevent the expansion of the society on too large a scale, and upon the

further proposition, that, whilst the citizens should be economical, they ought not to devote their paramount attention to the excessive amassing of wealth. There is, in fact, an essential connection between these two propositions; both supplement each other as just inferences from the principle, that the communal state ought not to be permitted to expand beyond its own boundaries. For, owing to the parallelism existing between the life-course of the communal state and that of its citizens, it follows that, whenever the state engages in conquests, the individuals must also employ a corresponding part of their activity at the expense of the rest; that is, they must strive to rule and amass wealth, if they do not intend being swallowed up by the conquered masses.

The excessive increase of the power of the individual, due, again, to wealth, can only take place at the expense of either his fellow-citizens or of strangers, for whose subjection he stands in need of the strength of the community, without, however, being willing, for his own part, to continue to subordinate his mode of life to considerations of the interests of local contiguity which serve as a basis to the community. Thus the democracy of the communal state develops into a plutocracy, which for the first time employs the strength of the entire community for confessedly selfish objects, and which, by making the interest of amassing wealth for consumption—that is, for the purpose of indulgence in luxury—the principal and leading aim of the society, regards that interest as the central principle of its organism.

A society and a state, which have conquest and plunder for their object, may, however, arise not only from the communal but also from the tribal state. Not indeed directly, for the organism and constitution of the tribal state, like those of the communal state, prove their vitality only where the conception of the interest of local contiguity of the tribal members can be asserted in their direct contact with each other. But, in the case of tribal states, as in that of communal states, constant warfare with the neigh-

bours leads to conquests, and, in the course of its conquests, the tribal state is frequently compelled to force one or several communal states into its service. This shifts its centre of gravity, for the ruler of the tribe, who is at the same time its victorious leader, settles down in the subjugated city he regards as his absolute and private domain, whilst the aristocracy, composed of the subordinate military chiefs, undertakes the government of the conquered districts.

The great conquering empires of antiquity, the Egyptian, the Assyrian, the Babylonian empires, the empire of the Medes and Persians, and the Macedonian empire—all of them arose from the extension of tribal states over communal states, and from fresh conquests achieved by them on their new foundations; whilst the Athenian empire, which was not destined to ever entirely realize the scheme laid down for it, the Carthaginian empire, and, lastly, the Roman empire, that most conspicuous type of a consciously conquering state, present themselves as conquering societies and states developed from pure communal states.

Thus the society founded on the interest of amassing wealth for consumption becomes first embodied in a plutocracy, formed in a democratic city-community, or in a tribal aristocracy which has broken with its traditions, and presents itself in sharp antagonism to the established formalities and traditions of the state in the sphere of which it arises, especially as it endeavours to secure conscious class or private interests, and to perpetuate privileges that had originally arisen upon temporary circumstances. In order, however, to achieve this, it is compelled to appeal to the masses, and by promises of momentary gain and of self-indulgence without exertion, to win them over to a course of action which would enable them—now emancipated from the demands made by the communal state upon every moment of their private life, and freed from public duty—to acquire great wealth at a slight and only momentary risk, and to keep strictly before their eyes their private interest alone. The wealth requisite for this object can be obtained only through the labour of others, and through the

systematic and business-like management of the institution of slavery, in order that the utmost profits may be insured. This again requires new conquests for the extension of the rule over strangers, and a perpetual offensive warfare; in the course of which military chiefs enrich themselves by an undue share of the booty, at the same time, however, satisfying their soldiers by giving them a share appropriate to the level of their conceptions of life. In empires built up by such conquests, the members of the central community or tribe, who, owing to the loosening of the original bond of their society, develop into a real ochlocracy, form a privileged mass absolved from all traditional and moral considerations, and who, now regarding only their own pleasure and comfort, care nothing for the fate of their subjects. Such continual wars meanwhile give rise to a centralized power and to a form of government of a military type; the communal state loses its outward characteristics, whilst the predatory society assumes the form of a ruling state, whenever some emperor or despot obtains the leadership of the ochlocracy, and becomes the founder of a monarchy which is, properly speaking, of a military character and absolute, but which has the outward tinge of democracy, and is styled, after its most illustrious representative, "Cæsarism."

The march of conquest in such a state can only be checked by rival conquests of other states of equal power, by further extension being precluded owing to natural circumstances, or, finally, by the enormous dimensions of the conquered territories, as the difficulty of keeping together and applying the means of power interferes with their effectiveness. At the same time, the plutocracy constantly changes in its substance; it depends upon the favour of the people, then upon that of the army, and, in the last place, upon the favour of the despot, whilst the population of the central city, inordinately increasing, entirely loses the characteristics of its origin. The lower classes, weaned from work and gratuitously maintained, gradually sink to the level of a proletariate, whilst the middle and upper classes,

excluded from independent participation in the management of public affairs, and guided merely by the private considerations of enriching themselves, are absorbed by that bureaucracy, which is indispensably necessary in directing by commands the affairs of such an extended empire. Thus the society engaged in amassing wealth for consumption gradually devours its own elements, robs them of all fitness for the struggle of life, of all initiative spirit and of every sense of appreciation of public interests of a higher order. The soldiers and civil officers form in a measure an exception; but they, too, look upon the public service merely in the light of securing their private interests, and as an opportunity for acquiring fortune and rank; and, as soon as there is no prospect of gain nor any enemy sufficiently rich to contend with, or, when those who have the supreme power in their hands shut out the subordinates from the road to wealth or station, the public service affords them no longer any advantages, and they feel it only a burden. At the same time, as the number of those who are fit for the public service and can be compelled to enter it is constantly decreasing, the burden of it finally rests with a crushing weight upon the shoulders of those only who are compelled to submit to it owing to their peculiar circumstances, especially since in the absence of foreign elements beyond the pale of the society which might serve as objects of extortion, both the army and the central organs of the government attempt to turn to their use the productive agencies of their own society and to enrich themselves at their expense.

§ 89. Yet a considerable period of time intervenes between the formation of a society having for its object the amassing of wealth for consumption, and its decay; and during the long stretch of time separating these two phases the interest upon which this society is founded is fruitful of salutary results to the cause of civilization.

To begin with, it is this conquering society which is the first to exhibit cosmopolitan features. Within its boundaries the interests of consanguinity and of local contiguity

cease to be dividing barriers, whilst they still do service as the bonds of subordinate social spheres; the family appears, for the first time, as a strictly civil institution, and the first instances of dissociation of the communal affairs from those of the state are here to be met with. The idea of world-citizenship and of the community of mankind looms up, as yet, it is true, without any moral substance, but still gives rise, in course of time, to the possibility of human equality, and to the conception of universal interests which may be severed from public affairs of state. And as the people of the original conquering community or tribe becomes, in the course of a few generations, merged into the world-empire, the rights of citizenship—depreciated in value, it is true, when compared with their importance in the communal states, but still valuable with regard to those living outside the empire and to slaves, and even to freed-men—are extended equally to every inhabitant, and lead to that wide application of the principle of equal rights, from which alone the conception of natural original rights and the idea of the community of human interests could develop. Parallel with this course of development, we also experience that the power of the state is employed on large public works, partly carried out to satisfy the taste for luxury, but partly also with a view to utility. Permanent public memorials have already, it is true, been erected by the communal society, but less as a matter of utility than as an expression of religious or patriotic sentiments and of a sense of the appreciation of the beautiful. In the conquering society they are first introduced to gratify the vanity of the conquering element, but, later, large material and advantageous investments are made, and extensive constructions are carried out, for the purpose of pacifying the people of the whole empire, of giving them employment, and of increasing the productive power of the state. To this class of public works belong, for instance, the construction of aqueducts, the digging of canals, and, above all, the building of roads and the deepening of harbours, with a view

to rendering the military defence of the immense territory more effective, and in order to afford facilities for centralizing public administration, and to increase the means of communication. To these must be also added institutions for the promotion of a better administration and of commerce, such as the post, the means of a regular conveyance of merchandise and persons, and, in connection with the latter, a system of fortifications in order to insure safety. As a rule, utilitarian considerations, serving the selfish ends of those in power, assert their influence upon social and state activity, but partly from device and partly from an inherent community of interest, they also tend both directly and indirectly to the benefit of the masses. As a natural result of increased intercourse and production promoted by government — which likewise affords a counterpoise to the monopoly of public power and public life by those in power—the emancipation of the relations of private life follows, and in part as the instrument and the security, in part as the effect of that emancipation, also the entire independence and thorough development of private law; whereby the absolute and full assertion of individuality on this domain is attained. Conjointly with this, large fortunes arise, and an accumulation of large amounts of capital ensues, whilst the masses become impoverished, and those of inferior station are subjected to merciless oppression. The first period of the equality which private law confers is undoubtedly that of the greatest contrast between the rich and poor, a period affording security to every indulgence of the former, and utterly ignoring every consideration due to the latter.

§ 90. The interest of amassing wealth for consumption thus leads to such a striking contrast between the destinies of the members of the society as can no longer be ignored; the conquering state continually exacts fresh sacrifices from the oppressed; the rulers are able to maintain their position only by renewed and increased efforts, and see no further prospect of improving their condition; the luxury of the society excites the desires and

the hopes of foreign enemies to an ever-growing pitch, whilst the bond uniting its elements becomes more and more artificial and mechanical; within the dominant society itself, the generally recognized ideas of order, peace, equality, and prosperity can be realized to a comparatively slight degree only, the familiarity with this very realization still lessening its value; the creation of a perfect state-organism seems impossible, and the dissolution of the existing state of things, involving the loss of all that gave value to life, becomes inevitable; and at last, in spite of external uniformity throughout the empire, the memory of the former independence and import of its several parts still survives in the city-communities and in the remnants of tribal organisms—both of which now exercise but little authority with regard to local affairs, but are nevertheless made to bear, through the agency of the public administration, all the burdens connected with these affairs. It is, therefore, but natural that when all these circumstances concur, universal and widely-spread discontent should prevail, and that every element of the society which still possesses energy, and in which the last spark of capacity for initiative has not yet died out, should look about for new objects to satisfy the higher claims of the human spirit.

Since, therefore, life, such as afforded by the community, precludes all high hopes, and the mere bettering of the individual lot presents itself as an object of a subordinate and precarious nature, men's minds revert to their inward aspirations, and the striving after individual perfection, and the ordering of life according to ideal considerations, are left as the only worthy and appropriate tasks. Hence, indifference to the cares of the world and disregard of material profit and advantages more and more gain ground in the highest strata of the society as well as in the lowest; and it may, indeed, be said that, from the very moment of the formation of the society of conquest, the assertion of the independence of the intimate world of inward individual sentiment over the social ties becomes a

characteristic phenomenon. These aspirations, among persons of a higher position who are troubled by no worldly care, assume the shape of philosophy, and, among the oppressed classes, that of religion.

Philosophy is the result of methodical ways of thinking already developed in the communal society. Its appointed task, whilst the society is flourishing, is, in the first place, to precisely define, systematize, and idealize the conceptions and their application to public concerns within a perfect communal state-organism; and, in the second place, to discuss and reconcile the difference which subsisted between the ordinary and popular view of the religious myths and rites of the communal society and between their symbolical theories, harmonizing with the reasonings of science and corresponding with a higher standard of moral sentiment. But just as the development of the communal state cannot remain stationary within the limits of the principle of its own society, so can neither the progress of philosophy stand still at this particular period and be alone content with the accomplishment of the above-mentioned tasks.

When, therefore, the world-empires arose, philosophy also began to busy itself anew with the explanation of the universe, yet now no longer with that ingenuous and primitive conception and endeavour from which it originally sprang, when, in laying particular stress upon external phenomena, it considered its duty accomplished, if it succeeded in accounting for them by some particular propositions and fictions. Philosophy now proceeds with the decided consciousness that its true vocation requires it to present a picture of all observable phenomena, both spiritual and material, and to show these to be the consequences of that uniform and higher law, which is, at the same time, also the rule of conduct and of moral perfection in individuals. Hence, that sublime notion of nature, which pervades the Stoical as well as the Epicurean systems, and hence also a tendency to invest moral judgment with an excessive importance, a tendency which

presses more and more to the front during the later periods of advancing philosophy, and owing to which the speculative element in the philosophical systems shows a growing disposition to appreciate the importance of the relation between the visible world and the world which can be only conceived, and the significance of its effects upon the individual. This chain of thought leads again to a religious conception of the forces manifesting themselves in nature and in the human spirit, and ruling the universe; it leads to their recognition as the attributes and emanations of the Deity, which constitute the distinctive doctrine of later Stoicism, and which, being applied to the individual, led up to the religious ideal of the philosophers, the germs of which can already be found in Plato, and fully developed in the cogitations of Marcus Aurelius.

Yet, since every ideal pertaining to philosophy is unavoidably aristocatic, and since there are, in comparison to the mass of mankind, necessarily but few philosophers, those elect of nature and culture, and, further, since to soar above the world and to remain indifferent to worldly goods on mere theoretical grounds, and without any ulterior hope, can from the nature of things be but the privilege of the cultured, philosophy could, for these reasons, never extend beyond certain narrow limits. It remained, therefore, the sole property of the educated and privileged classes; and although it was the first and spotless herald of universal brotherhood and philanthropy, it affected the masses and the subsequent destinies of mankind but indirectly; partly, through rules of conduct suggested in practical life; then, though in a slight measure, through the example of its followers, and most of all, through its influence upon the subject matter of other, purely religious doctrines; yet it could never furnish a principle for the formation of an independent society, although it counted amongst its supporters some of the most enlightened and powerful men of the age.

§ 91. If, therefore, philosophy, the refuge of the enlightened and prominent classes of the conquering and

predatory society, proved but ill-adapted for the diffusion of a new life, and if, in consequence of soaring above the level of the conceptions of the people and above the circumstances of its life, it could not become the central interest and bond of organization of a new society, it was natural that men should look about for a substitute suitable for furthering a fresh development.

Thus, that other and twin view of life, the roots of which had struck much more deeply into the various layers of the people, and reached down into the soil from which its remotest traditions and most unalterable sentiments had sprung, presented itself in order to take the place of philosophy. This was religion; faith in a world beyond, trust clinging to the superhuman, hope founded upon future life; these common boons, accessible to the lowest and the most unfortunate, alone remained as factors swaying the convictions, and as ties fitted to enlist ready and voluntary co-operation, and in themselves capable of uniting the masses broken up into individuals. But religion could only serve the purpose of a leading interest of a society, if it appeared in a form in which its chief importance was no longer due to the external ceremonials surrounding Divine worship, but in a form wherein its entire essence was pervaded by a moral tenour attractive to the spiritual disposition of individuals, penetrating inward life, regenerating the old nature of the believers, and kindling an irresistible enthusiasm in their breasts, and one wherein it found its embodiment in the notions of faith, hope, and love. These had, in sooth, not always been the pivotal notions of religion, and could only become so within the wide sphere of a conquering society.

Religion, in the consanguineous society, was at first the result of fear, afterwards the consequence of a cowering spirit of blind submission to tradition, and, finally, a symbol of seclusion and exclusiveness. It first sprang in the forms of Animism and Fetishism, from the fancied power of the departed, and from the experience of the transcendent power of natural agencies surrounding man, and was sub-

sequently developed by a sense of wonder and respect for the unusual and exceptional, embracing the more striking phenomena of nature, especially those of the heavens and seasons, even if of daily occurrence. The conviction of the worldly usefulness of religion, its assimilation with things traditional, and hence its attachment to all the agencies of the proper sphere of a society as against foreign enemies, and, finally, the feelings of devotion developing in parallel lines with the ties of consanguinity, indelibly endeared it to the hearts. Its topics continued to be the worship of the spirits of the departed, as well as of those haunting all nature, and of the external objects connected with them; the placation of mysterious powers and their employment to the advantage of man by means of external rites; and, finally, the homage paid inwardly and by outward acts to the progenitors of the patriarchal sphere, figuring now as its preservers and patrons, and raised to the rank of divinities or of a higher class of superhuman beings. The influence of religion was nevertheless also productive of a moral result, already felt in the consanguineous society; namely, the gaining ground of the idea of the universal accountability of those inevitably adhering to it, not so much from faith, as from the fact of belonging to the same sphere of consanguinity. Primitive religion is not, as a general rule, the result of individual conviction; it is a motive influence just as tangible and as inseparable from social life, as any tradition, any familiar agency, or any accepted earthly authority. But it is for this very reason marked by all the attributes peculiar to the consanguineous sphere in regard to its members; and, just as a perfect solidarity must prevail among the individual members of the ruling sphere of kinship as towards the members of any hostile society, even so does this community and collective responsibility assert itself in the relation of its members to the superhuman powers. Thus, an offence committed by any member of the society draws down the wrath of the Deity upon the whole of the society, whilst the appeasing of the Divine wrath procured by any

appropriate act of placation has the effect of wiping out the sins of every one of its members.

In the early stages of a society founded on local contiguity, religion retains this its feature, but it becomes consciously polytheistic through the co-ordination of the divinities of the various kinships forming the component parts of the society, and through a grouping of the transmundane powers corresponding with the order of the tribal and of the communal state. In addition to this, as man's rule over nature increases in extent, religious conceptions are remodelled and rendered consciously anthropomorphous after the pattern of human attributes, and the various forces and phenomena of nature undergo a mythical personification or deification, until, finally, the attributes of the gods are conceived as corresponding with idealized human characteristics. At a later period, when the society itself establishes its rules with fixed purposes, Divine rule is no longer casually revealed by scattered capricious manifestations alone, but becomes the source and sustaining spirit of the laws of causal necessity now beginning to be recognized, whilst familiarity with abstract ideas and with their domain identifies the supernatural powers with notions of a general character, and with conceptions which present themselves at first as fatal forces existing before the Deity side by side with, or above it, and, subsequently, as embodied in the essence of the gods, as asserting themselves in their attributes, and as symbolized in the religious fables concerning them. Hence, parallel with the division of the society of local contiguity into two classes, namely, into the aristocratic and democratic elements respectively, follows the double meaning with which the religious propositions are invested—the ordinary literal one for the masses, and the figurative and mystical one for the prominent and enlightened. Poetry steps in, and, weaving the two explanations into one web, renders the moral meaning of the loftier explanation accessible, whilst respecting the outward shape of the inferior one. Philosophy proceeds from the former alone, and erects it into

a theory. Nevertheless, the preponderating importance of externals and ceremonies continued to be acknowledged in all the relations of the community. Religion was looked upon as being essentially the symbol of the social bond, and the fulfilling of the tasks and duties connected with the veneration due to the gods, and with the expression of attachment to the state. Want of faith and indifference to religion met with the same condemnation as want of patriotism and contempt of civil virtues, for they were considered identical; and thus religion became still more intimately connected with the ties of the society than with the spheres of individuality. Where, again, as among the Jewish people, the tribal state presented itself in the traditions of the population as the immediate descendant and expanded form of the patriarchal society; and where, owing to natural circumstances, such as its seclusion from the world and the austere character of the people, it developed in all its purity, whilst its tribal religion, grown on the tree of a single kinship, was under the influence of doctrines of a higher philosophical level during a long period of oppression, being fostered by a priesthood destitute of all class privileges, but jealous to maintain the exclusiveness and purity of blood of the tribe—here, after the state had become finally consolidated, religion appeared as the worship of a supreme and jealous Deity. In this form it united in itself all human attributes in their highest idealization, and, whilst admitting polytheism in other peoples, it carefully preserved its evolved monotheism for itself, and identified with it unreservedly the destinies of its own society.

§ 92. The functions of religion within the conquering and predatory societies of the world-empires undergo, owing to the influence of the latter, a complete change, and almost cease altogether. Two groups of reasons of a different nature combine to develop within the world-empires religious toleration and the freedom of religions to their utmost extent. In the first place, the interest of amassing wealth and the ideas to which it gives rise, are of

a thoroughly worldly character, and the palpable notion of material advantages, exerting a paramount influence upon the modes of thought of the society, does not generally encourage either mythical speculation or blind devotion to things far off and distant. For these reasons the leading spheres of the society are generally disinclined to place themselves in antagonism to currents of thought which are not of immediate danger to their rule and policy, and which even draw off the attention of those, whom they engross, from the political arena ; and are reluctant to persecute individuals or social spheres, whose energies find employment and satisfaction in apparently innocent quarters, and who might prove dangerous if turned into other channels. Moreover, the leniency of the government, thus manifesting itself in the respect shown on the part of the dominant conquering society to the tribal and communal religions, tends to make it appear, as if the subjugated elements were still living, and could live up to their ancient traditions without interference. In the second place, owing to the conquests of the world-empires, even the religion of their dominant communal or tribal society lost the importance it once possessed within the narrow limits of a society of local contiguity, when it was intimately connected with every one of its agencies, and developed hand in hand with them ; it now became only a body of external ceremonials, which were, in the main, but emblems of power, and to which the state, founded upon new principles, attributed importance only in their outer form without reference to their moral aspect. In proportion as the conquered foreign elements were absorbed, their religious notions and rites were gradually added to those dominant hitherto, until at last we find that, in the Roman empire, religion became to be composed of a heterogeneous collection of Pantheons, exactly as the mass of its people was formed out of various subjected societies. Hence, in world-empires, every religion is bound to tolerate the presence of others, to recognize them, and to live with them in peace. Religious intolerance is viewed there as a reminiscence of

the ancient exclusiveness of race and tribe, as the spiritual disturber of the peace of the world, as hatred of universal humanity, and as antagonistic to the conditions of existence of the state. Finally, religion became in the eyes of the rulers a body of externals, merely emblematic and without any deeper meaning; they appreciated its value only to the extent of its fitness to minister to the supremacy of the established government, and as far as it might be expressive of the manifestation of the devotion of the subjects to the sanctioned powers of the state.

But, in proportion as the official religion grew emptier, more insipid and more servile, and sank down to the level of a mere intermediary of worldly considerations, it became more and more deserted by the mass of those who could derive neither comfort nor peace of mind from the interest of amassing wealth for consumption, and who were excluded from a share in the intellectual products of the civilization of the age. The poor and the oppressed, for whom there is no hope amidst the splendours of society, and whose lot is but toil and disdain, those who are filled with grace and devotion, and have a contempt for all worldly vanities, the charitable and devout, who cannot bear the thought of prospering at the expense and through the sufferings of others, the ardent and enthusiastic, who are unwilling to relinquish the glories and the hopes promised to their race or tribe by their ancient faith, although those glories or hopes were restricted to narrow limits, all these aspire to the agencies of a spiritual inward life, and long for a religion containing the means of moral justification, and which is precious to them in proportion as it comes home to the heart of man. Hence, if, under circumstances which arouse faith and trust in Divine revelation, a doctrine springs up, and accounting for the miseries of earthly existence, and affording scope for the yearnings of single-mindedness and goodness towards the infinite, stirs up hopes of a future world beyond, —whether these hopes centre in the salvation of the soul, in the promise of bliss which cannot be realized on earth, or

in the lapsing into a state of unconsciousness—such an inner religion, penetrating every part of disposition and character, becomes at once a fundamental and leading principle, and a vital interest, which alone is invested with actuality in the eyes of the faithful, and utterly excludes all cares and strivings foreign to it.

Such a faith becomes accordingly the germ and bond of a new society, and finds, within the sphere of the world-empire, access to the whole of mankind, whose bond of unity, founded hitherto upon external institutions, it offers to widen and strengthen by its doctrine of universal responsibility. This doctrine it borrows, as a prime essential, from the ancient creeds, and now merely strengthens and extends it to its utmost limits, in conformity with the currents of ideas of the established society, by the notions of original sin, of salvation, and of last judgment with reference to all mankind; ideas which, too, are taken from the remotest traditions, but are now congenially invested with a deeper spiritual meaning.

§ 93. The effect of the new vital interest and of the new religious doctrine manifests itself at first in the altered morals and in the change of the mode of life of the believers, to whom the contrast between their own practices and between the established customs and generally accepted views seems even greater than it really is. The religious indifference of the society of the conquering state—which, from the fact, that men seek no longer the conditions of success in supernatural agencies, but now rely in this respect entirely upon their own discrimination and strength, had become part of its very system—contrasts sharply with the fundamental tone of that deep conviction of exclusive trust in the Deity, and of the corruption of human nature, which keep the ardour of the faithful continually awake, and almost prompt them to go in search of suffering and martyrdom.

At first, however, the believers continue to cling to the framework of the tribal or communal religion which has hitherto supplied them with spiritual food, and merely

think of widening its sphere so as to render it accessible to everybody; until at last the conflict between the preponderating stranger elements which have joined them and the unyielding spirit of the supporters of the purity of the ancient views, produces a schism, which first rouses them to the consciousness of their separate social existence, and brings them at the same time to the notice of the ruling society, as an element hitherto unknown, but one independent of, and thus antagonistic to, itself. At this period the work of the social organization of the Church begins, and the apostles, disseminators, and teachers of the faith become at the same time leaders, guards, judges, and guides, also with regard to worldly conduct, which is now shaped in consonance with the claims of the new doctrine. Ecclesiastical authorities, leading to transmundane salvation, and preparing souls for the kingdom of God, also spring up; and where their words are preached, the commands of the powerful on earth are unheard, even as an empty sound in the desert.

A struggle between the religious society, which, although confined to narrow limits, is incomparably compact and ever growing, and between the conquering society, is, as a consequence, inevitable. The latter employs, during this conflict, every means in turn; beginning with forbearance, and a just and even mild application of the law, it passes finally to most cruel persecution and oppression. At times it discourages the activity of informers, and punishes only infractions against lawful order or the evasion of social duties, and that leniently; at others, it enacts special laws, not so much for the suppression of doctrines, as for the purpose of preventing the formation of dangerous leagues; later, it smites with the whole rigour of the law, or allows free course to the licentiousness of the mob actuated by hostile passions against the new religion; and, finally, it ends with persecution, and tries to extirpate, with despotic power, all the elements foreign to its own sphere. But all these measures, so far from ensuring success, are only a fresh incentive to the ardour of the

followers of the faith, and tend to increase the unity of the Church and the strength of its organism. For the only remedy against this evil is the influencing of religious convictions, and this remedy is not within the reach of the conquering state from the very nature of its principles and organism. Under the protecting wing of toleration the work of conversion is carried on more and more openly, and soon assumes large proportions; laws circumscribing the right of association only lead to a more careful selection of the organs of the Church, to a matured and thorough organization of its official authorities, and to a higher pitch of administrative centralization. The violence of the masses makes the persecuted appear in the light of victims to disorder; whilst the tyrannical acts aimed at them provoke pity for those, whose heroism rouses admiration and incites to imitation, and whose persevering tenacity survives the onslaught of the most desperate attacks, which from its very nature must be short-lived and capricious. Besides, every development in the Church at the same time weakens the established power of the state, for the most valuable elements, in joining and placing themselves at the disposal of one society, sever their connection with the other.

But the religious society itself passes meanwhile through a far-reaching internal transformation. Hand in hand with its expansion, its practical rules of life also develop, and the external law and order of the Church, although still having the propositions of faith for their centre, gradually adapt themselves, not only to the spiritual, but also to the worldly wants of the faithful. The Church acquires worldly possessions, forming its common property, which it employs in succouring and supporting the needy and the zealous; it establishes regular offices and authorities, and introduces an ordered public administration and fixed principles and rules of conduct. Individual enthusiasm no longer occupies every domain of ecclesiastical activity, but yields to disciplined and deliberate effort. The Church does not disquiet the guilelessness of the believing mind, but it permits wisdom drawn from ex-

perience to ensure the result of its labours. The claims of a holy life obtain recognition as being exceptional and as standing above the considerations of that common morality which may be generally exacted, and which is also asserted by means of discipline; considerations which, resting upon the moderating effects of civil and worldly relations, are not of so compulsory a nature, as to deprive the faithful of their chances of general activity in their own affairs, or as to exclude them entirely from the assumption of civil duties.

And thus, in spite of continual conflict and of an irreconcilable antagonism of principle between the two societies, their main conceptions draw closer and closer to each other in the minds of the masses who are unable to comprehend the final consequences of theories. In due course of time those who attribute importance to mere external forms, and deem to secure by the preservation of the latter the existence of the state, although the essential principle and tendency of its workings have undergone a change, see no extreme danger in the acceptance of the doctrines of the new society by the conquering society, and even expect the rejuvenescence of the tottering state by the help of new moral agencies, and the invigoration of its enfeebled power by the support of the Church.

§ 94. When the ruling classes who are theoretically indifferent to religion are thus brought to acknowledge the irresistible power of the latter, and, at length, outwardly accept its doctrines, the Church, too, becomes, for the time being, reconciled to the institutions of the conquering society and clings to them all the more closely, since it soon perceives them to be the most effective means of its own firm establishment. Accordingly the conquering state adds religious aims to its own aims, and the Church occupies a recognized, and very soon a leading, position in the state, its own authorities becoming the organs of the religion of the state. The sphere of the religious society thus expands to an extraordinary degree; yet this society loses its former inwardness from the very moment it no

longer deems its task to consist exclusively in the realization of its own aims. Hence arise, in a great measure, the schisms in the Church; which, indeed, had casually occurred also previously with reference to theoretical and doctrinal questions, and led to internal commotions within the religious society, commotions rendered however less violent by the hostile attitude of the dominant state against all votaries of the faith without distinction; but these schisms now become thoroughly envenomed, because the differences of opinion concerning articles of faith are coupled with diverging conduct in the political relations of life, and assume the form of questions of power, whenever the possibility of gaining the ear of the actual government seems feasible, and when protection by the state means practically the suppression of antagonists. This inaugurates the first period of the persecutions of heretics within the Church and by the Church, persecutions which are far more sanguinary than those formerly instituted by the state against religion, because now it is conviction and not mere worldly policy that lurks beneath the motives for persecution; the Church no longer recognizes the excuse of individual conviction, which had been often accepted by the indifference of the conquering society.

The scales between the mutual services rendered to each other by the religious society and the worldly state do not however remain very long evenly balanced, for the weight of the Church is constantly increasing whilst that of the state is dwindling. The former being a society in the course of development and consolidation, urges more and more vehemently the assertion of its aims, whilst the interest of amassing wealth for consumption becomes more and more subordinated to that of religion, and is at last looked upon as justified only if the wealth obtained is devoted to religious objects. The state, too, now viewed in theory as imperfect in itself and capable of righteousness only in the service of the Church, loses also politically its supremacy, and soon its independence, the earthly community thus becoming a mere preparatory stage for the

city of God and the world to come. This gives rise to the peculiar phenomenon that, in the contest between the various creeds and denominations, victory does not in the long run adhere to the one that humbles itself most before the power of the state, but that the state eventually lends the aid of its arm to the one most favourable to the independence and to the centralization of the Church. When this happens, the state has completely changed its texture and its central principle; its common tie and its society have all become strictly ecclesiastical.

§ 95. That phase in the life of the ecclesiastical society, during which it becomes dominant and itself the state is much less apt than the corresponding phase in the life of other societies to strike the mind, and this for various reasons. In the first place, this period presents a picture of continual warfare, coming partly from abroad, and directed against the state, which is no longer able to maintain itself as a conquering empire, and partly arising from religious persecutions and from the violent propagation of religion, in the course of which both the power of the state and that of the Church appear merely as centralized and absolute militant organisms. Thus an absolute rule is produced, under which a change in the vital principle is much less conspicuous than within the sphere of free communities. In the second place, the Church is never during any phase of its development able to manage its multifarious secular affairs immediately through its own authorities; but, keeping always spiritual and earthly tasks apart, it leaves the latter to be attended to mediately by other societies, serving as organs subordinated to spiritual aims. Hence the peculiar complexion of the ecclesiastical state, and hence also the notion, that office is not invested with independent power, such as was possessed by the authorities of the previous societies, but that it is merely the occupation of a sphere of action bearing upon fixed tasks, transferred to it by, and emanating from, a superior power. Both a hierarchy and self-government may indeed be found to hand in the conquering society, but the

hierarchy in such society is strictly an engine of power, the subordinate organs of which are the blind instruments of the superior ones, whilst in the organism of the Church all have a share of Divine right according to the extent of their functions; again, self-government, confined originally to mere local interest, becomes subsequently the depository of tasks to be solved through power delegated to it; and hence both of them, a hierarchy and self-government, can attain their full development in the ecclesiastical state alone.

Starting from this period, therefore, a double current of life may be observed within the Church itself. One, the internal current, tends purely and directly towards spiritual aims, and that higher level of faith and morality, which is the result of exclusive striving after the ideal, and of the recognition of the absolute value of the individual soul, as far as it is considered free—that is, as harmonizing in its endeavours with the requirements of faith,—and which, in the monastic orders, is embodied in the devotion to aims of individual holiness, and thus enlists and absorbs the noblest and most precious elements of the society. The other manifests itself in the appropriate management of worldly affairs for the promotion of the interests of the Church in the consolidation of its rule, in disciplining, within allowable boundaries, the great mass of mankind, and in the regulation and transformation of every-day life. This circumstance gives rise to that double standard of morality applied by every Church; one standard of morality for its elect and its saints, and the other for the great multitude. Such a double standard is not the casual outgrowth of one or another system, but inevitably springs from all attempts at realizing spiritual aims through human communities. Hence arises also that antagonism between the living faith and the law, which is continually starting up in every religious society, and the reconcilement of which, resulting in the co-operation of the two factors, constitutes the most splendid triumph of ecclesiastical government. Ecclesiastical law always faithfully reflects the difficulties

of the worldly relations of the Church, and those concessions which the Church is compelled to make to the infirmities of its organs, and to the lower grade of its adherents' understanding.

For this very reason the substance and system of its rules, as well as the the tenour of its institutions, are, to a great extent, drawn from the law of the conquering society which immediately preceded it, the spirit and purpose of which are, however, newly shaped with a view to assimilating them with the spiritual interests of the Church. The authority asserting the dominant principle of the Church always, however, constitutes its direct source, whilst this authority itself is bound to represent the law to the faithful as of transmundane revealed origin, or as inherited through tradition divine in character. This circumstance furnishes an explanation of the phenomenon, that falsifications occupy a prominent place among the sources of every body of Church law. This is due not so much to conscious intentions of the hierarchy, as to the natural disposition of the ecclesiastical society to claim a supernatural origin for its order and regulations. When it cannot credibly trace them back directly to its founder or to other sources of revelation, it is wont to ascribe to matters, the acceptance of which is claimed by the public consciousness as a necessity, at least such an origin as is sanctioned by the lapse of time, which public opinion has received as indubitable, and which, in consequence of the practical application of the principle of authority serving as a foundation for the ecclesiastical society, is generally accepted without any contradiction. The falsifications of the ecclesiastical law are, properly speaking, no mere forgeries, but consequences of the same phases of thought, which give rise to legal fictions in the worldly law of the communal societies during its earlier stages of development.

§ 96. When the ecclesiastical society thus develops more and more in its organism the consequences of its situation and power, and seeks the satisfaction of the interest peculiar to it in external rules and institutions, its

moral notions become inevitably rigid and less pliable. As a natural result, it is no longer able to adapt itself to the changing phases of the spiritual wants and expectations of its believers, whose obedience and attachment now become a mere matter of external form, and whose ardour for co-operation towards a common aim now cools down. At the same time the influence becomes felt of those agencies, owing to which the culture of the members of the ecclesiastical society, and the prosperity of its adherents, have sunk to a lower level than that occupied during the halcyon days of the communal and conquering societies. The chief one of these causes is the fact, that the organism of the ecclesiastical society is confessedly ill-adapted to satisfy secular interests, and that these interests are entrusted to the organs of subordinate societies who do not work harmoniously together, and therefore cannot meet the needs and wants of a society of a wider sphere, with which they did not simultaneously develop. In addition to this, the most distinguished, the most conspicuous, and the most disciplined elements of the society being absorbed in the service of the ecclesiastical organism, those only are left to attend to strictly secular affairs, who are less qualified to do so, and whose understanding hardly rises above the rude ignorance of the great mass.

This may account for the phenomenon, attending every period of ecclesiastical rule, that the subjected secular society is broken up into spheres of a much lower order, and much less extensive than those of the period immediately preceding it, and that institutions again spring up, which resemble in turn the patriarchal and the primitive tribal organisms, although reminiscenses of the law of the antecedent conquering society frequently save these formations from the appearance of absolute primitiveness. Feudalism itself, the remarkable case of the intermingling of private property and of the authority of public law, the figuring of personal fidelity as a social tie, and the splitting up of the interests of insignificant territories—all proclaims kinship with institutions belonging to the earlier phases of

human development, with the exception that these new institutions, instead of being founded upon the interest of consanguinity, or of immediate local contiguity, are based upon association by contract, forced upon men by circumstances. Another agency contributing to lower the level of civilization during this phase is the estrangement from the ideals of the beautiful, the harmonious, the humanly artificial and artistic, and the materially useful, caused by exclusive devotion to extramundane objects; an estrangement that sees in the products of the antecedent culture tendencies and aims antagonistic to faith, and which, as it is unable to eradicate from the heart of man endeavours aiming at the attainment of immediate worldly advantages, turns them into much coarser channels, and casts them into moulds much less perfect. Finally, the decay of culture in the ecclesiastical society is brought about by an additional circumstance, namely, that owing to religious conversions by means of the sword, numerous such elements as have had no share in the development of the communal and conquering societies are received into its sphere, and therefore lack the proper disposition and adaptability fostered and developed within the sphere of those societies.

§ 97. Where, therefore, the rule of the ecclesiastical society is definitely consolidated—leaving, however, the frame of the conquering society undisturbed, but so that the latter as well as its subordinate spheres become mere organs of the Church—all progress, the spread of new ideas and the influence of external intellectual agencies are shut out, and the society becomes perfectly stationary and purely conservative, and dwindles at the same time in strength. In consequence of being immured in interests not of this world, it now enters upon a career of slow and gradual decay. The germs of a new life will henceforth be met with only in such circles as are less affected by the oppressive weight of the organism of the Church, and which, owing to their situation, are more accessible to intercourse and contact with foreign elements. Hence, the more subordinate lay societies are at this period more capable of development

than those of a higher order; just as a tree, the crown of which has withered, sends fresh shoots from its humble roots and not from its loftier branches. These inferior societies of a lay character present anew individually the same phases of development, through which the consecutive series of the human societies have already once passed.

Thus, corresponding with the patriarchial organism, primitive associations—arising from companionship in arms for military ventures, and passing almost precisely through the same influences which had formerly led to the formation of tribes—become permanent feudal societies, and a nucleus for the formation of a people. The fostering and more thorough care bestowed upon local interests calls again into existence communal states, though no longer independent; and this course of development leads anew to attempts at organizing conquering societies. The power of the Church still retains its supremacy over these new formations, but the aims of the Church and the secular interests of the new societies now figure side by side as of equal importance. Indeed, the only way the Church—availing itself of the advantage of its prominent position—is able to preserve its dominant power, is by using and siding with the organizations of a higher order, continually forming within the minor societies, as the latter begin to be dangerous, and are in course of consolidation and aspire to independence from the dominant society; and by thus becoming itself, though from motives of interest, the means of hastening and securing progress. It thus leans upon the firmly-established principalities, which possess a more highly-developed feudal organization as against the semi-barbarous tribes, upon the cities as against the leagues of the feudal lords, and upon the new conquering empires as against the communal societies, which attempt to regain their independence. It takes at the same time unremitting care not to allow any of the new societies called to its aid to increase too much in power or to become independent. To accomplish this, it again invokes the help of those very groups which it had combated, against

such of its former allies as may threaten to become too powerful, and thus makes it its chief object to consistently maintain the balance of power between the various new social formations and to ensure their co-existence. This seemingly complicated and intricate, but essentially very simple policy accounts, accordingly, for the phenomenon of the great and many-sided variety of institutions and organisms, and for the existence side by side, and loose connection of, the structures peculiar to the different societies, which fills mediæval history with apparently so numerous contradictions.

§ 98. But it is this motley mixture of the groups of interest, and the incessant frictions and collisions between these spheres of various orders, grades, and kinds, and their mutual absorption of each other within the periphery of a yet common civilization, that lays the foundation for the rise of another new vital interest, and of a society embracing the same. These it is that stir into life nationality, the principle and the uniting tie of the future national state.

The notion of nationality comprehends two kinds of elements—natural and historical ones. The former are identical with those of race, as consisting in a common origin and language, and in a similarity of temperament; and the latter consist in traditions of common vicissitudes, perils, and efforts in the past, in the consciousness of a common destiny, and in the hope of a common future. It is obvious, however, that natural agencies are at the same time of a historical character, for races nowhere and at no time form groups of kinship of perfect purity of blood, but they are the results of amalgamations extending over a larger sphere, such as are observable in the case of different tribes.

As to unity of language, this again, depends upon a variety of external agencies, since in primitive times it cannot indeed either obtain or continue over a larger territory without the pressure of external political circumstances.

If these influences in the formation of nationality are

nevertheless contradistinguished from historical ones, it is because they are the results of currents of events too remote and of too abstruse a character to admit of their being particularized and signalized in the same way as can agencies, the development of each of which can be singly traced and accounted for. The natural elements do not, however, by themselves as yet originate nationality; for, during the remoter periods of humanity, their sphere is too wide to be capable of producing an actual community of interest of a permanent and paramount nature; whilst, at a later period, they are hidden from view by the interest of conquest for plunder and by that of religion. It is only when they are coupled with those historical agencies, the memory of which has left vivid traces in the minds, and survives in all its purity in the generations of a later age, and when these memories present themselves as pledges of a future attainable by combined effort only, and when faith in a common origin and the possibility of mutually understanding each other and of a mutual exchange of ideas are conceived with reference to a higher aim, and as guarantees of united exertions for the purpose of securing the common welfare, that there can arise beyond the naked fact of nationality the consciousness of all that constitutes its essence, and that places nationality on a level with the other great vital interests of humanity. It sometimes happens, however, that, even in the absence of the natural factors, a sphere of interest of nationality springs up strictly under the influence of historical influences, which assert themselves with overwhelming force, especially if the circumstances of geographical position, or some imminent danger threatening from a common enemy, take the place of the agencies of fusion above indicated.

This whole course of things presupposes, however, the existence of a society of an order superior in its interest, which forces the minor societies into a common mould whilst the process of their fusion is taking place; and it is this very function of developing nationality that is performed by the ecclesiastical society. Indeed, when the or-

ganism of the Church has become definitely crystallized, the religious interest supplying its central principle has already lost much of its vitality and ceased to be a leading one. For the conscientious conviction which had called the Church into existence was, by becoming attached to outward form, robbed of its freedom, and thus lost all that constituted its most precious element. In consequence, new vital interests, hitherto neglected, press to the fore. The necessity of giving free scope to intellectual, scientific, and artistic activity, awakened to new life, the incentives to enterprise springing from the consciousness of the wider community which had been gradually formed under the lead of the Church, supply independent vital aims, for the accomplishment of which sufficient room is afforded neither within the narrow feudal spheres, constituted in imitation of those of kinship, nor within the communal spheres circumscribed by the limits of local contiguity, nor even within the spheres of conquest for plunder designed exclusively for the benefit of a ruling class; whilst the whole structure of the Church is irreconcilably antagonistic to the fundamental principles of these aims. Thus, worldly energy, again called to life, creates for itself upon the foundation of national sentiment a society of a wider sphere, the struggles and trials of which become those of the national state.

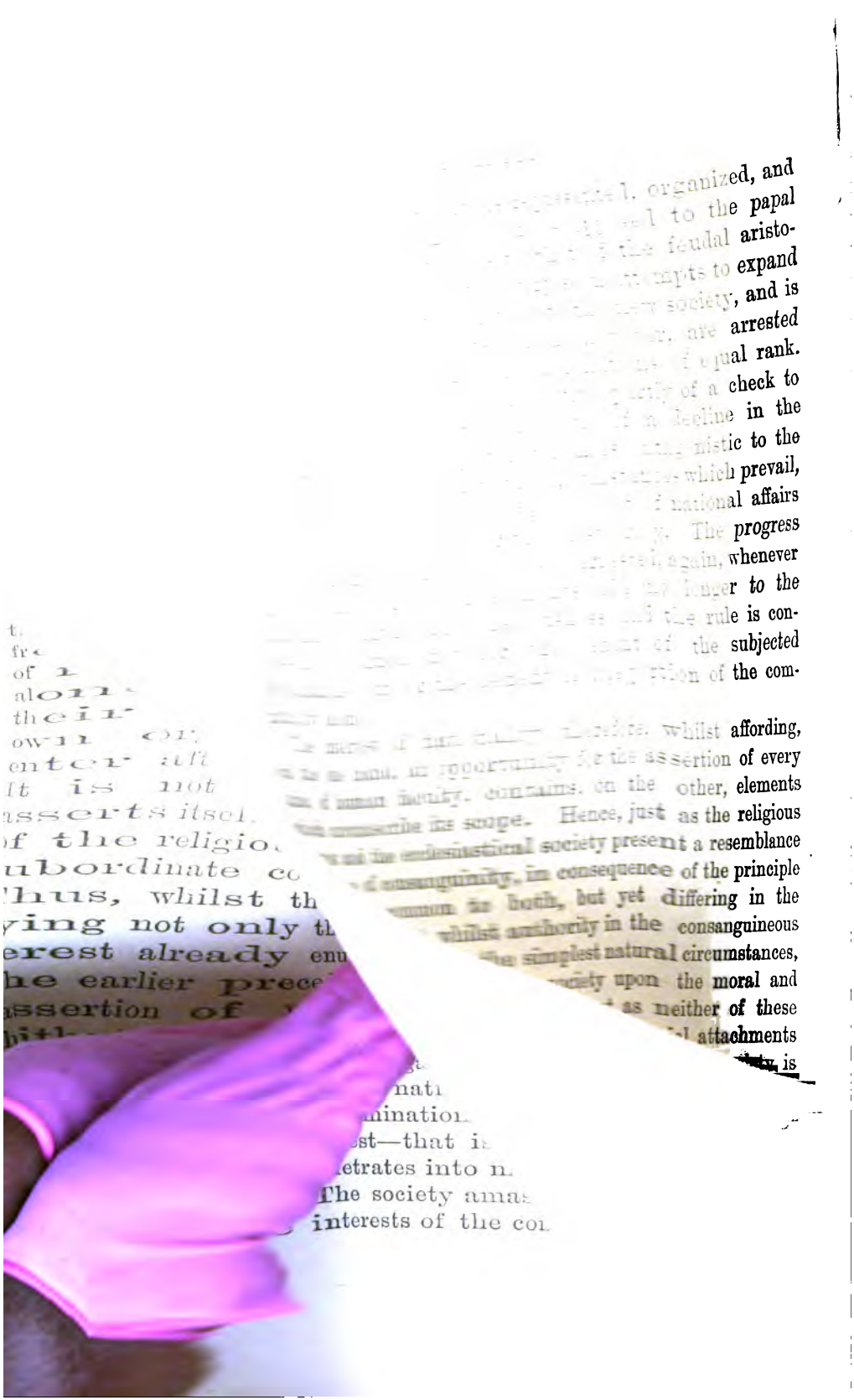
§ 99. Hence, seemingly, it should follow, that the sphere of national interest is narrower than that of religion, or even than that of the conquering society, and the appearance of the national interest after the former in point of sequence would thus involve a contradiction to the proposition that an interest of a higher order is, at the same time, one of a wider sphere.

But a rigorous analysis will render it at once evident that the national interest and society embrace a greater variety of subjects, and are of a wider sphere and of a higher organism than the Church, and more assuredly still than the preceding societies. If we glance at the series of qualities composing national character, such as pursuing

generally the same modes of life, adhering to identical customs, having a piety for common traditions, an acceptance of common political conditions of material prosperity, an identical standard applied to the weighing of intellectual achievements, a ready recognition of identical modes of procedure, inquiry, and progress, and a harmonious vibration of identical chords in the hearts of men; and, if we further consider the common manifestations of all these qualities expressed in identical forms, we find that these manifestations are coupled with uniform conceptions of the claims of duty and with a uniform interpretation of the voice of conscience, which arise in this case, not from the revelation of supernatural authority or power claimed by the ecclesiastical society and from its violent assertion through external measures, but by agencies emanating from man's own individual conscience, by the movement of regained liberty receiving its impulse from moral springs alone. Consequently, just as the previous societies find their respective interests most benefited, not while their own organization is dominant, but within the spheres they enter after descending from dominion, so it is in this case. It is not within the Church that the religious interest asserts itself most completely, but during those later phases of the religious society, when the latter presents itself as a subordinate component of the subsequent national society. Thus, whilst the national society affords room for satisfying not only the religious interest but every other interest already enumerated, to a greater extent than all the earlier preceding societies, and admits, besides, of the assertion of peculiar conceptions and energies such as hitherto had not in general risen to the surface, its own sphere and enlarged organism becomes also more perfect; this is, because the national society is the first which ignores any discrimination between its members with regard to its interest—that is, any distinction of classes; and therefore penetrates into much deeper strata than its predecessors. The society amassing wealth for consumption serves the interests of the conquering and plundering

class which—though its members change—is confined to a comparatively inconsiderable number. The ecclesiastical society, though it began humbly and admitted everybody, could really and honestly afford a share in its vital principle but to those few, whose faith was above all earthly care, and who were able to live up to the exactions of a morality of a higher order. The national society, however, takes the idea of liberty from the communal society, that of equality from the conquering society, and that of brotherhood from the ecclesiastical society. It strives to realize them connectedly and uniformly with regard to the sphere of all those who belong to it, by endeavouring to be the intermediary of the expression of the will of all its citizens. Indeed, it becomes truly dominant only from the moment when it accepts overtly or covertly the doctrine of the sovereignty of the people, and acknowledges the rightfulness of that power alone, which serves the public aims of the whole nation. Hence, this is the first society which consciously draws its rule from within itself, and not from external factors.

This does not imply, however, that its organization has always been necessarily democratic, and that it has not developed through all the phases characteristic of the growth of every society. Those who give the first impulse to its formation are of that class of reformers who, whether they enter the arena of religion, politics, science, or art, appeal to the people, not as being inhabitants of a community of local interest, but as being members of that larger sphere, which is capable of understanding them and of sharing their enthusiasm, and is stirred up into new consciousness in the presence of the crumbling ruins of the organism of the conquering empires and of the rigid formalities of ecclesiastical rule. The further course of formation of the national society may be traced in the conflicts carried on by the societies of a lower sphere—figuring as the organs of the Church—amongst themselves, and against the conquering society when striving to regain its rule under the mask of the Church. During these



aware of the bearing of the interests of its own members upon the universal objects of general humanity, regards other national societies not only as entitled to rights equal with its own, but as supplementing itself; hence national states do not seek that seclusion, nor strive after that absolute self-sufficiency, peculiar to all the preceding societies. This accounts for the circumstance that the period of national states is also marked by the consolidation of the system of international law.

§ 100. The national state, nevertheless, cannot be considered so definite and perfect a polity amongst the societies, as to form the utmost boundary of their development. It is, however, undeniable, that it is just as permanent a sphere and just as valuable in itself, as any of the others answering their respective interests, and that, therefore, if it descends from dominion and casually yields to other state organisms, resting upon a different and higher principle, it still must preserve in that subordinate position its importance amongst the organisms furthering vital aims. The federation of mankind, based upon the external balance of national states, is the ideal of the future, as invariably pictured in the minds of the present generation. Yet the [illegible] developed from the circumstances that [illegible] attended national self-preservation, as well [illegible] for encroachment and greed consequent [illegible], too, as the inequality of nations in strength [illegible] such a solution hardly appear probable, [illegible] future. Still, it would seem to be a [illegible] the not only organic, but also [illegible] that some vital interest con-

conflicts the national society is represented, organized, and centralized by the kingly power as opposed to the papal and imperial rule as well as to that of the feudal aristocracy. This regal power itself very soon attempts to expand beyond the limits set by nature to the new society, and is eager for great conquests which, however, are arrested by the common resistance of other nations of equal rank. These struggles again are productive partly of a check to the social development, and partly of a decline in the strength of the kingly power, which is antagonistic to the latter; whilst, according to the circumstances which prevail, the monarchy is relieved in the conduct of national affairs either by the democracy or the aristocracy. The progress of the ruling national societies is arrested, again, whenever the casually subjected elements add no longer to the national strength and consciousness, and the rule is confessedly designed, not for the benefit of the subjected populations, but for the benefit of one portion of the community alone.

The interest of nationality, therefore, whilst affording, on the one hand, an opportunity for the assertion of every kind of human faculty, contains, on the other, elements which circumscribe its scope. Hence, just as the religious interest and the ecclesiastical society present a resemblance with those of consanguinity, in consequence of the principle of authority common to both, but yet differing in the circumstance, that, whilst authority in the consanguineous society is founded upon the simplest natural circumstances, it rests in the ecclesiastical society upon the moral and abstract agencies of faith, and just as neither of these two societies are characterized by territorial attachments of an intimate character, even so the national society is akin to that of local contiguity. There is, however, this divergence, that the material limits to the interests of local contiguity are, in case of the interest of nationality, replaced by spiritual limits—the influences, namely, which obstruct united development—and, further, that a national society, being from the circumstances of its origin and development

aware of the bearing of the interests of its own members upon the universal objects of general humanity, regards other national societies not only as entitled to rights equal with its own, but as supplementing itself; hence national states do not seek that seclusion, nor strive after that absolute self-sufficiency, peculiar to all the preceding societies. This accounts for the circumstance that the period of national states is also marked by the consolidation of the system of international law.

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need to be supplied as fully, quickly, promptly, and as easily as possible, for labour to be turned into the most productive channels, and its results again placed where they can satisfy the most general, most urgent, and most immediate wants.

The national society necessarily constitutes a condition precedent to a society organized for such purposes, for it is its vocation to thoroughly develop every capability inherent in any people. Competition would, without this, only add to the dissensions between classes and nations, instead of affording an opportunity for the profitable employment of everybody's activity everywhere, serving at the same time its own purposes, and solving the same problem in the world of material wants which formerly presented itself to the ecclesiastical society in the world of spiritual wants—namely, the securing of the recognition of a sphere answering the absolute right of the individual. And, certainly, a society realizing these conditions, and organizing in conformity with such an economical vital interest, would present itself as one capable of satisfying and embracing much larger spheres of peaceful co-operation than any society that has hitherto figured in history. Commerce and trade, which during the primitive cultural stages of mankind were the constant instigators and attendants of open warfare, and, at a later period, merely the means of selfish oppression and of amassing wealth for consumption, would, under such circumstances, become the instruments by which all class privileges would be abolished. The employment of the factors of production in the interest of the individual would lose its selfish character from the very moment when, after having brought about a just and definite reconciliation between the interests of the individuals, the public interest represented in reality the sum total of the individual interests. The only organism, however, which can be conceived of as answering, in every respect, this condition of things, is the state, where the law would be universal and dominant in the fullest sense of the word. Such is a state, in which the social relations would

be ordered by general and fixed rules of a nature similar to that of the rules of the civil law.

§ 101. The organization of the vast economical society of the future depends, accordingly, upon manifold agencies such as have had as yet no opportunity, at any place or time, to display their full effect, and the internal value and mutual influence of which with regard to each other can be hardly weighed. Nor is it, therefore, possible to forecast with any certainty the manner in which the balancing of these agencies would be effected, especially as, during the process of consolidation of such a society, the inclinations of men and their capacity for discipline and organization would necessarily undergo a change. At present, we can only point out those aims and formations in which the new vital interest has hitherto manifested itself; yet, even as to these, we are unable to estimate them in their full import, since we are compelled to look at them solely in the light of their relations to the dominant national society.

These movements may be observed within two spheres, namely, within the national sphere and, outside of it, within the sphere of international intercourse. They find their utterance in the first place in those agitations which it is customary to characterize as "socialistic," and which, in their higher forms of to-day, differ from the earlier movements resembling them in outward appearance in this: that they do not emanate solely from the needy classes, nor exclusively confine themselves to the task of establishing a mechanical division and equal distribution of wealth, like their precursors; but strive to attain, before everything else, the absolute certainty and reliability of the means of livelihood and development of the individual, and to secure that the various human activities, harboured by the society, shall not be merely afforded an equal shelter in an aimless and formal manner, but be harmoniously directed towards a common aim.

Another characteristic feature of these later movements, referring of course to those which are justifiable, and

which may lay claim to a future, is that, whilst formerly agitations of the kind rested their hopes of success simply upon some measure of violence, direct in its action, within the national sphere itself, and upon the reduction to equality of the various classes of society through external pressure, and maintained at the same time as against foreign peoples the fierce attitude inspired by lust of conquest and greed of plunder, these movements now take into consideration the situation and circumstances of all the members of the various spheres which, from an economical point of view, are perceived to react upon each other, and regard as well the degrees of the various capabilities, as their claims, consequent upon the greater or lesser importance of the duties to be performed.

Another field for the operation of the agencies, which give an impulse to the formation of a more general economical society, is brought to view in a series of institutions, extending in principle beyond the nature of the national state. To this class belong the principle of civil equality generally recognized in our age between foreigners and the citizens of any state, the right of free emigration and settlement, the almost uniform recognition and assertion of the system of international private law, the international regulation of the criminal law and of the laws relating to patents and copyrights. Of this character is, likewise, the creation and development of means of universal communication, on the strength of international treaties, the range of the influence and application of which is daily extending over additional relations of life, and finds its expression in the ever-increasing number of laws of a cosmopolitan character.

§ 102. The degree of excellence or perfection, which this purely economical society may attain, can, of course, only be a matter of speculation, as long as we are shut in by our limited horizon. But of one thing we may be sure, that, even affording the most favourable opportunities to the whole mass of economical interests, the totality of human aims will not be thereby exhausted, although in

the mass of these economical interests a greater variety of such aims may be satisfied in a greater multiplicity of ways, than we are able to determine at present. Vital interests of the highest order are yet, in our own days, the aims of voluntary, individual initiative merely, but, if we reflect upon the processes which preceding isolated vital interests have passed through, and if we conclude from the past to the future, the inference is inevitable, that a day will arrive in the far off dawning future—no matter how remote—when these, too, will become the cherished objects of organized society. The works of benevolence and love reaching far beyond the sphere of the individual, nay, beyond that of any single generation, the task of ascertaining and spreading that scientific truth which sheds its bright light upon the universal framework and all the ages of mankind, and, coupled with these, the putting to the utmost use the power of man over nature, and the realization of the artistically beautiful under all the circumstances of life, and not merely to the extent of its being rendered accessible, all these are ideally inseparable from the notion of a dominant society of the most developed order. A society of this character shall embrace in its fold every ideal, every vital interest, and all the antecedent societies, and knowing no distinctions of class, race, religion and nationality, and losing sight of all considerations of place or boundary, will afford the possibility of satisfying the entire aggregate of the spheres of universal human interest within its own periphery, and thus render definitely triumphant the highest imaginable aim of combined activity, namely, the harmony of universal peace.

§ 103. The theory of societies thus deduced from the system of human wants, vital interests and aims, affords simultaneously a solution of the question of human progress and civilization. Its historical proofs obtain a convincing force, only in that they afford a satisfactory explanation of universal history upon the basis of the fundamental proposition, that the present level of European

culture is the highest hitherto reached by mankind, and that the process of its development has been normal. The answer to the question whether our theory is equal to the task of explaining by its laws the phenomena of other civilizations, or whether in this its attempt it meets with insurmountable difficulties, affords an additional test of the correctness of the theory itself.

§ 104. It is undeniable, that the history of European culture is more varied and richer in its contents, and brings into full light a greater number of phases of special development than that of any other culture. It represents the influence of all those agencies, without any exception, which, either singly or in some variety of combination, explain the systems of other civilizations, and, besides, includes factors, peculiar to itself.

The consanguineous society, here, as everywhere else, gave rise to those primary social spheres, the traces and memorials of which are, without exception, discoverable in every human community, whether rude or cultured. Thus we find that the most ancient civilization affecting the course of that of Europe, namely, the Egyptian, the origin of which is shrouded in the impenetrable darkness of past ages, but even the remotest memorials of which indicate already a high level, presents, in the semi-mythical tradition of Egyptian kingship at the period of its foundation, the existence of the tribal and communal organisms at the very point of their transition into the condition of a conquering society. Besides, the distribution of the several tribes and communities, the ties connecting the various groups of kinship, the peculiarity of the adoration of animals, the character of the local religious rites, the worship of ancestors, the customs of marriage, and the prevailing public and private morals observable in ancient Egypt are all only referable to consanguineous associations —necessarily antecedent in date to the oldest monuments. The standard of these associations may be determined beyond a doubt, by relationship having been regarded solely from the female side, which can be only accounted for by

community in woman, which had prevailed at some earlier period in kinships of a still remoter era, and by subsequent endogamous rules of marriage.

The institution of caste points, again, to a period of a tribal organization, hallowed by the sanctions of remote antiquity, gradually broadening in consequence of repeated conquests, but left comparatively undisturbed by external interference, and yet striving to rigorously seclude itself from foreign elements; whilst those flourishing cities, for which the Egyptians were celebrated in the eyes of foreigners as a matter of tradition as far back as the days of Homer, bear witness to the development of the communal society, although that development may have been somewhat one-sided, and presented but little variety.

In like manner, we find this to be the case in all the empires and dominions of Western Asia. Its various populations, the Chaldæans, the Assyrians and Babylonians, the Lydians, the Phrygians, as well as the Semitic races, the Arabs, the Jews and the Phœnicians, and, finally, the Medes and Persians, who established their rule over all the rest, present, in their career, a picture of all the stages of development, from the rudest forms of the consanguineous society to the most elaborately-ordered organisms of the patriarchal society, and, again, from the forms of the tribal and communal society to that of the conquering society amassing wealth for consumption. They thus clearly prove that this course of development arises from human wants and circumstances of a general nature, and not merely from the peculiarities of any particular race or people. The opposite view, entertained with reference to the history of some of these populations, has its origin solely in the circumstance that, on the strength of accounts either dating from a more recent period, or modified to suit ulterior currents of thought, institutions and phenomena have been accepted as ancient and primitive, which, in point of fact, had assumed their shapes after a long course of development, and were the embodiment of results brought about by a higher degree of development.

This has especially been the case with the Jewish people, where the traditions of earlier periods had quite disappeared in the presence of the patriarchal organism, and where the religion, in a manner similar to that of the Persians, was marked by the peculiarity of belonging to a higher order than we can account for by reference to the level of the social circumstances with which we find it linked. This peculiarity is explained by the fact, that the religion of the Jews undoubtedly arose partly from the transplantation of doctrines belonging to a higher level of civilization, and partly owed its appearance of superiority to the circumstance, that the legends of the tribal religion of nature-worship were subsequently invested with a moral and philosophical meaning foisted into them by a later age. We do not, however, among any of the above populations, excepting perhaps Persia, find the conquering society amassing wealth for consumption in such a perfect form as we do in Egypt. The reason is, that they were less favourably situated with regard to the conditions required for the anterior development of the communal organization, or that, if they did possess them, they had been prematurely deprived of them. The only exception to this, to be found amongst Semitic communities, is Carthage, the most vigorous offshoot of the Phœnician cities, the history of which runs parallel with that of the Greek and Roman communities, and the destinies of which fall under the same criterion is the destinies of the latter.

§ 105. A tendency to similar formations may be perceived in the Iberian, Celtic, Germanic and Slav populations; yet all of them were interrupted and modified at a comparatively earlier period by external civilizations of a higher order. The Iberians before the Carthaginian and Roman conquests, the Celts in Gaul and Britain up to the time of Roman rule, and in Scotland and Ireland far into the Middle Ages, had none of them advanced beyond that primitive stage of tribal society, when it is just emerging from the patriarchal form of the consanguineous society. The military and religious institutions, and those

of property, all still bear the mark of a primitive consanguineous community. The Celtic law in general—unable as it is to define any relation of society, of power, or of dependence, or even the relation between teacher and pupil, without reference to the model of paternal rule—furnishes, in connection with other matters, such for instance as refer to procedure and property, most interesting particulars concerning those of its ancient institutions, the germs of which still survive in higher cultures, and which, under external circumstances similar to those surrounding their original development, again send forth shoots during the first period of the formation of feudalism, though lacking as yet, so to say, any definite shape. Nor did the Slavic communities show a much greater advance during the period intervening between the fifth and the tenth centuries, that is, until the period when other populations, in a state of higher development, began to assert a paramount influence over them. Here, too, during the tribal period, still we meet with house—and village—communities, pointing to the consanguineous tie, and which, with that wonderful tenacity, characteristic of the lower orders of organic beings and of social institutions alike, flourish anew, after the lapse of centuries, under the influence of such external agencies, as constitute a drawback to any development of a higher degree, but encourage the thriving of beings and institutions of an inferior order. On the other hand, we find the tribal society already established amongst the Teutonic populations on their entering the arena of history, although traces of even more ancient formations of relationship through the female branch, and of consanguineous institutions, are not wanting there either.

The consecutive sequence of the phases through which these tribal societies passed, can be followed step by step from the time of Cæsar to that of Tacitus, and then again to Jordanes, Paulus Diaconus, and the Venerable Bede, with such exact particularity, as to make the vicissitudes of the Germanic tribes patterns of instruction, as it were,

by which to study and recognize the looseness of the ties binding together the primitive societies of local contiguity.

§ 106. The era of the communal state, again, presents itself in its full perfection in the history of the two great classical countries. Not as if, by any means, there would, in their case, be any difficulty in penetrating to the remote traditions of much earlier stages; for, owing to the abundance of data extant, especially with regard to Greece and, though to a somewhat lesser degree, with regard to Rome also, we are able to trace almost all the stages of their social formation back to their very beginnings. The memories of an utterly unorganized condition of sexual and communal relations, surviving in the myths and traditions, the isolated and half-patriarchal mode of life outside any wider social sphere conceived as the primæval mode of life from Homer to Plato and Lucretius, the legends speaking of the condition during the Golden Age,—in which we meet with the particular features of the most primitive era, mixed up and embellished with ideas born of poetical fancy and philosophical abstraction, and which, a thousand years later, gave rise to the theory of a supposed state of nature, —the legends relating to the societies of the Amazons, where the women were supposed to rule, and to the contest waged against the latter by Heracles and Theseus, the representatives of male supremacy—the interpretations of the mythical fables of Bellerophon, Œdipus and Orestes— the traditions connected with each of the many cities of Greece—and the explanations afforded to the initiated as to the mysteries and religious doctrinal propositions, all these bring forcibly before us the various phases of the consanguineous society amongst the Greek populations. With these peoples it would seem that, in consequence of the great extent of intermixture and migration, as well as of the continual intercourse with foreigners, the transition from an inferior stage into that of the tribal society was an immediate one, and the family hardly ever developed into the proper patriarchal society. The conscious application and artificial employment of the institutions of the organism of

kinship for the purpose of strengthening, and if possible, upholding unchanged the condition of things in the tribal society—producing thus a tribal society with an organism more archaic than its own would naturally have been—can be traced in the institutions of the Doric, and especially of the Cretan and Spartan communities, and may again be found idealized in Plato's Republic. The picture of more highly developed tribal state-formations, already mixed with the communal, and of the institutions of the kingship of the Heroic Ages, has been preserved to us by Homer. The annals of Athens disclose step by step the formation of a perfect communal structure, and at length the latter presents itself in Solon's constitution, as based definitely and purely upon its own principles. Roman history, on the other hand, opens with a posterior phase—that of the erection of the communal state. Here, the paternal and the patrician rights with the attendant religious fictions point to an antecedent patriarchal organism which, in all likelihood, had already become crystallized to an extraordinary degree. The vicissitudes in the career of Rome, as of Athens, preserve in their full variety the changing phases of the destinies of the communal state, and, in the case of Athens, find at last their conclusion in the Macedonian world-empire, and, in the case of Rome, in the Roman world-empire; conquest, plunder, and the amassing of wealth for consumption, together with the concomitant ensurance of peace, remaining the exclusive objects of both.

§ 107. A reiterated sequence of development is again disclosed to us during the Middle Ages, from the fall of the Western Empire down to the failure of Charles V., in his attempts at attaining the empire of the world. Yet the various phases do not present themselves here as being independent and distinct; they adopted forms tempered and modified in character, owing to the dominating influence of the ecclesiastical society, under the protecting wings of which they were sheltered and fostered. The populations replacing the Western Empire had all of them attained the

form of tribal organization; but, during the great crisis of the world, this organization was able but in part to maintain itself, and stand the strain that had to be supported by a bond of community.

Thus, at that period, there arose three distinct groups of social ties, each being of a different nature, and each looking forward to a different future. The first was that of the dominant universal ecclesiastical society which, as it became ever more and more compact and consolidated, down to the twelfth century, from that time entered gradually, though surely and inevitably, upon its downward course of decay—and this in spite of all its structural and spiritual advantages. The second was that of the tribe, and later that of the people. Having been at first subservient to the ecclesiastical society, this latter appears to wane during the tenth and eleventh centuries, but, revived by fresh agencies since the beginning of the thirteenth century, and being more or less antagonistic to the church, it furnished material for the formation of the national society and state. In the case of the third, the order of the centuries starts afresh; it takes its departure from the feudal spheres which, being unconscious imitations of the consanguineous societies, are formations resulting from primitive circumstances similar to those of these last, but are subject to the assertion of higher influences, and assume more definite shapes, in the same consecutive order which is characteristic of the primary structures of humanity. At a subsequent period, they give rise to the generous development of the institutions of the tribal society in the feudal principalities, and to that of the communal societies in the Italian, and, in part also, in the German cities. In the Holy Roman Empire, however, they cast upon European civilization the shadow of a conquering state unable to cope with its task; and Europe owes its subsequent escape from a fate similar to that of the Byzantine Empire, to the dispelling of the dreams of the Hispano-Germanic world-empire. But even at this period, the hold of the feudal institutions upon minds proves strong enough to cast the

yet undefined forms of the structure of the national state into the mould of the institutions of patrimonial kingship, which owe their origin to the degeneration of the feudal ideas.

§ 108. In determining the natural order and sequence of the societies, there obtrudes the embarrassing question of the mutual relations between conquering and religious societies. The two positions, that the preponderance of the religious interest is due to an overcloyed satiety produced by the previous absolute dominion of worldly considerations, and is the necessary result of a reaction consequent upon the recognition of the vanity of merely secular hopes and strivings, and that universal world-religions and churches can only develop within the periphery of world-empires, are simple enough in theory. The fact, that there have existed great conquering empires in which neither religions nor churches speaking to humanity at large have arisen, would not present any essential difficulty. For every onward step depends upon the co-operation of such a variety of favourable — sometimes almost accidental — circumstances, that if any one of them happens to fail, the seed falling upon barren rocks refuses to germinate, or else the tender organism degenerates; untimely growths and unripened seeds being in history, as in nature, infinitely more numerous than those which survive and are fit to live. With reference to the proposition, however, that the relative positions of the Roman Empire and Christianity should constitute the rule for the consecutive order of the two societies in general, misgivings of a twofold character may arise. These are, first of all, due to the circumstance that, according to the common view, theocracies had existed before the Christian Church, as, for instance, the Egyptian and the Jewish polities, to which a partly theocratical character is ascribed; and, secondly, to the further circumstance that, in the case of the Mohammedan Empires, the ecclesiastical society appears to have preceded the conquering society in point of time. Now, as to the first objection, we must bear in mind that theocracy and an

ecclesiastical state answering the wants of a religious society are notions of a different order.

Theocracy in itself, being the hierarchical rule of a priestly class, is but a species of aristocracy, to which the aristocracy of any society may attain, whenever it bases its rule, not upon rude force and material advantages alone, but upon moral and spiritual agencies in harmony with the views and faith of the society to which it belongs. Since, therefore, in every social structure there exists a religion and a faith corresponding with its order and degree, any social structure may assume a theocratic appearance, only we must remember, that in these cases the creed and the hierarchy embodying it are not independent, and do not pursue vital interests peculiar to themselves, but are only secondary expressions,—diverging from the normal ones,—of the respective interests of kinship, of local contiguity, and occasionally of conquest for plunder. We find, besides, in the case of the instances already cited, that, whilst in Egypt the family and tribal relations of the religion and its attachment to the ancient fictions is obvious, it obtained its higher unity and philosophical significance only in the era of the conquering society. Again, in the case of the Jews, the original, and in reality exclusive, character of their religion, is beyond all doubt tribal and racial, whereas, with regard to its more universal and refined propositions, the supposition cannot be avoided, that these propositions received their wider interpretation and adaptability during the conflicts with the Assyrian Empire and the Babylonian captivity, from the influence of conquering societies, and through the inspiration of the prophets, actuated by views of a broad and general nature. Yet, even then, the Jewish faith had not become a proselytizing faith—which is the most important quality of a religion which really serves as a vital interest—but obtained this capacity for embracing new followers only in Alexandria, after Rome the most cosmopolitan city, and the most splendid community of the conquering society of the Greeks. Here, in the works of Philo, that intermingling of the Jewish faith with Greek

philosophy took place, which subsequently prepared the way for the affiliation of the doctrines of Christianity to the ideas of the Græco-Roman civilization.

The determination of the character of the Mohammedan communities and of the part they played in history is a task of greater intricacy. We will not dilate in this place upon the fact, that the Mohammedan religion itself is not a primary and immediate growth of faith, and that it was engrafted, in great part at least, upon the tribes of Arabia from the branches of Christianity; and further, that whatever there is in it expressive of the religious interest, did not originate in the conception of those spheres to which it subsequently spread through conquest—for, from the outset, it recruited its faithful by violence alone—but was a part of it owing to its original constituent factors. It suffices to point out, that very shortly the doctrines of this religion came to be conceived entirely in the sense of the identity of worldly and of transmundane interest, of their non-antagonism, and dependence on each other, and that, consequently, its articles of faith present themselves as sanctioning, nay, as demanding, continual conquest, and as an embodiment of the interest of plunder and greed, and not in the least, therefore, as the connecting bond of an independent religious society. The Arab communities themselves, in whom this religion arose and who were its champions, were tribal and communal societies, displaying marked traces of consanguineous structure, just in that very phase of development when the interest of amassing wealth becomes preponderating; and they dwelt at that time in the neighbourhood of two great conquering empires that had become enfeebled, namely, the Byzantine and the Persian dominions. The Mohammedan religion owed, therefore, its triumphs from the very first exclusively to the success of arms; and the states which grouped themselves around its society drew their structure in the main from the principles of the governments of the occupied countries which had previously formed parts of other conquering societies. Nor was the culture to which Mohammedanism gave rise

independent and proper to itself. All its splendour was derived immediately through the channels of the Persian, the Greek, and, to some smaller extent, of the neighbouring Indian civilizations. From this time onward, Mohammedanism meant progress in the case of those peoples only who had not passed beyond the stage of tribal development, and whom it enabled to expand their organism into that of the conquering society; whilst its proper society, compared with the first eras of its history, very soon began to retrograde and to show unmistakable signs of decay. Its part in the history of the world is not that of an agency of progress, but of a factor of stagnation, and thus of dissolution and degradation.

§ 109. How very different from the fate of Mohammedanism have been the destinies of Christianity! Its vital interest and principle was, in the fullest sense, not worldly, but independent of its external structure, and related to man's inmost life alone. The course of the formation of its doctrines was antagonistic to that of the society of conquest for plunder, and from the very moment that, under Constantine, its sphere became co-extensive with that of the empire, it at once looked about for new organs which might be of use as agencies of its independent development, and thus the continuity of the thread of the religious society was preserved, in the West, by the Papacy and by the monastic orders. In the East, however, the ecclesiastical society became torpid, because its structure was inseparably connected with that of the empire; hence it there abdicated its own life, and in fact passed through all the vicissitudes of the worldly society, which had remained one of an inferior order. In the West, on the contrary, its vigour never abated, and, although the empire crumbled into dust, the Church not only preserved its organism unimpaired throughout the long ages of barbarism, but continued to develop it. It had at its disposal its own hierarchy, its own organs, and, with the pliability of an institution instinct with life, it was able to stoop down to the populations and to raise them by slow

degrees to the level of its higher standpoint. Some of its institutions might become antiquated, the roots of its law might here and there wither, but it regained its full vigour whenever it appealed to its fundamental principles. Not only was it capable of contending against the ferocity of the lower classes, but it created and maintained an independent government, gathered armies in furtherance of its own ideal aims, and carried on wars for these ideals by means of the Crusades. By the establishment of the two great monastic orders of the Middle Ages, those of the Franciscan and of the Dominican friars, it met the wants of reviving worldly culture, and, subsequently, its influence and its new forms made themselves felt, through the Reformation, in the development of the national society, in spite of the fact, that the endeavours of the counter-reformation and of the Jesuits were no longer able to secure in its behalf the weight of undivided dominion over Europe.

§ 110. The second, we might say the first, great religion, the doctrines of which point to a genuine religious vital interest, and which has formed the central principle of an ecclesiastical society, boasts, like Christianity, of a varied religious, as well as political, history, which, however, has become almost entirely obscured and undecipherable. Buddhism arose among a people which possessed the qualities necessary for bringing forth a great culture, but was unable to preserve all the memorials of its history, for into the countries where it is now at home, merely its articles of faith and doctrines were transplanted, and not its antecedents.

The researches instituted by the vague and uncertain light of tradition lead, nevertheless, to results which suffice to allow of the inference of a parallelism between the development of Buddhism and the main features of the development of Christianity. But just as the Buddhistic creed, the disputes about the interpretation of its propositions, the ceremonies and rites in which it outwardly manifests itself, and the organs that represent its ecclesi-

astical polity, bear so striking a resemblance to the corresponding features of Christianity that—the supposition of a common source and of mutual influences being entirely out of question—we are driven, in order to explain the similarity, to accept the only possible conclusion, namely, that religious conceptions, faith and its external manifestations, are governed by general laws springing from human nature: even so we find that, with regard to the society, whose currents of thought gave birth to Buddhism, all circumstantial evidence corroborates the general doctrines of historical relationship we have already laid down. Ancient Brahminic India and the entire culture of the classic era of Sanscrit indicate a phase in the existence of a highly developed conquering society. The Vedas themselves can be the products only of a tribal society which has passed beyond the structure of kinship, whilst the two great Hindoo epics—although not wanting in echoes of a more ancient condition of things—picture communities essentially corresponding in their organization with that of the kingships of the Heroic Age. The code of Manu places before us the sacred law interwoven with the secular law of a stationary country resembling Egypt. Yet, the peculiarities of the institutions of the four castes approved by the sacred books, and thus grown typical amongst the fluctuating multitude of castes daily arising and perishing, the sphere of the functions of the Brahmins, the secular rule of the Kshatriyas, and the developed stage of philosophy, of linguistic knowledge, and of mathematics, testify to the existence of a society possessing tastes and tendencies such as we can only discover in Alexandria or in Rome during the imperial era. To this must be added the particulars of the legend which had grown around the person of Buddha himself, together with the experiences of Alexander the Great in India, which also point to the existence of kingdoms organized for conquest. Not a trace of any historical account has come down to us to shed light upon the question, as to how it happened that Buddhism, which, having taken root in India, and spreading to the south, east, and north, had

embraced three hundred millions of people in its fold, was completely driven out by a Brahminic reaction, and its place re-occupied by the religion of a society of an inferior order, or how it was that India in general sank back to that low level, which permitted the pigmy structures of a whole mass of earlier and ruder societies, in a variety of combinations, to regain the upper hand, almost in the same manner as happened in Europe after the crumbling into pieces of the Western Empire, except that in the former case, the presence of a uniting higher ecclesiastical society was wanting. In the absence of any historical light, therefore, all that may be stated with certainty at this day is, that from the time that the Mohammedan and Christian world have come into nearer contact with the Indian, and have had an opportunity (down to the era of the English supremacy) of closely observing its condition, the society of Hindustan has been of the same character as that of the European society from the time of the dissolution of the empire of Charlemagne, down to the period of the consolidation of the Holy German-Roman Empire. Only, in order to render this parallel quite complete, Papacy, the element representing the principle of order of the West, must be left out of account.

§ 111. The phenomena of Buddhism are of additional interest, because this religion forms the connecting link between the white and the yellow races; and, guided by this circumstance, a better judgment can be formed as to the phases of societies of the latter race. In Eastern Asia, it was only in Thibet that an independent ecclesiastical state, founded upon religion, was definitely established; but, owing to the fact that its elements were imported from without, and did not develop at home, and also because, apparently, the requisite sphere of the antecedent conquering society was wanting, the rule of the lamas shows the character of a tribal organism rather than that of a state answering the purposes of a world-religion.

In China, again, everything combines to indicate that

the empire, though traditionally recognized as the very model of stability and conservatism, has, from the earliest ages, freed itself from the ties centering in the interests of kinship and local contiguity, and remained in the stage of a society amassing wealth for consumption. We find there an extraordinary degree of religious toleration; the existence of most ancient creeds of a tribal character, which have even the characteristics of consanguinity, side by side with advanced religion, and, above all, with a native philosophy, occupying, as an agency of spiritual life, a more than equal rank with religion; an almost entire obliteration of the traces of the societies of tribe or of consanguinity, yet vestiges of the latter flashing up now and then amidst the conformations of the superior organism; and, finally, we see there civil equality coupled with the force of patriarchal sentiments, in consonance with a developed system of intercourse, and side by side with a mode of life not in the least patriarchal, nor of a primary religious character. This proves to us that the prevalent currents of thoughts and conceptions are not here the immediate traditions of an original patriarchal society, but the result of a long rule of cultured leading classes, and of doctrines taught and asserted through thousands of years by a central power in a community which is debarred by external pressure from independently and progressively developing, which manifests the tendency of its ideas in reproducing the phenomena of a much earlier phase, and in which the family feeling, aroused in a secondary way, grows again paramount in the absence of civic sentiment. All the circumstances thus enumerated, together with the additional one, that a whole line of foreign conquering dynasties succeeded each other without disturbing to any great extent the order of the society, furnish proofs of the universal applicability of the law of the necessary phases of society, and, at the same time, of the truth, that progress is only rendered possible through the continual intercourse of different societies; and, moreover, that a society, be it of dimensions ever so large, if

isolated and living only for itself, is destined to come to a standstill, and to lapse into a state of stagnation.

These inferences are still more corroborated, if we place side by side the examples furnished by the people of China and those of Japan, which latter, although deriving their culture from China, developed it independently and even more generously than the Chinese, from whom it had been originally borrowed. This fact is, no doubt, due to a great extent to the insular position of Japan, and leads to the result, that this is the only community outside Europe which has almost arrived at the conception of the interest of nationality, and most nearly approached the structure of a nation. Especially instructive in this connection is the bloody and protracted struggle carried on there also, in the course of the thirteenth and fourteenth centuries, between the Buddhist Church, which then enjoyed political supremacy, and the feudal organization of the state, a struggle which terminated with the victory of the secular power, without resulting, however, as in India, in the extirpation of the doctrines of the more developed religion, or in their complete supplantation by the more primitive Shinto views. From that time down to a recent period, when, under the influence of the European nations, Japan was remodelled after the pattern of the most modern civilization, it presented the picture of a society having feudal characteristics, though approaching the patrimonial stage. This explains why the transformation of the last years, and the transition into the modern national phase, was effected, on the whole, successfully, and with such comparative ease, whereas in China external influences of the same kind have produced, save a few instances of reaction, no appreciable results whatever.

§ 112. Whilst we thus perceive that the contact of European nations with the populations of Eastern Asia only served to render more conspicuous or to modify the peculiarities of the latter, whilst not destroying them, we find that the same contact with the old American civilizations of the torrid zone proved fatal to the latter, and utterly

overthrew them with a single blow. This was, in part, due to the inferiority of the powers of endurance and resistance of the races which were the bearers of that civilization, and, partly, to the imperfect condition of their natural and material means, and especially of their military resources. These societies were, in truth, in a condition not much more backward than the parallel states in Asia.

The states of Mexico, of Central America, the Chibcha people, and Peru, possessed alike a system of culture and an organism peculiar to old societies arising from conquest and founded upon the ruins of earlier civilizations, and preserved more or less the traces of the tribal organism from which they developed. We find chiefly in the Mexican and Peruvian empires a high degree of centralization, coupled with the distinguishing characteristics of a society constituted for the object of conquest for plunder: namely, a widely-spread network of communication, constructions, and public works of huge dimensions; different and mixed religions of the people, subordinated to the churches of the ruling classes, which were accepted as those of the state; and, finally, institutions and regulations of a feudal character. This last fact is in particular significant in connection with the tradition, that the civilization of those states was but secondary, founded upon the remnants of a still older civilization, which had been destroyed by the conquests of ruder tribes. Here we find, under most unexpected circumstances, a confirmation of the proposition, deduced from the march of development in Europe, that feudalism was the result of legal and political traditions of a higher order, though in more primitive circumstances, traditions which again came to the front, and favoured formations similar to the really ancient ones of remoter periods. Among these states, that of the Incas in Peru—which, in many respects, came quite close to the ecclesiastical organization founded upon religious interest—was of the highest order, exhibiting that patriarchal conception, which is at all times characteristic of the preparatory phases of ecclesiastical societies, in consequence of the kinship of

their fundamental principle with that of the society of consanguinity.

§ 113. Accordingly, a review of the phenomena of universal history will mature within us the conviction that, whilst the savage populations grouped around the interest of consanguinity can, at most, rise to the level of the tribal society, the interests of local contiguity are sure to become preponderating as culture progresses, and that the conquering empires, belonging to that stage of society which has conquest for plunder as its object, subsequently furnish a wider sphere of community. The religious society gives a fresh impulse to civilization of a higher order, on the basis of which, by uniting all the previous vital aims, it becomes possible to form nations which, in their turn, open new fields for the assertion of still loftier ideals of progress hitherto not realized, at first always by means of social co-operation, but later by the aid of institutions of the state, which are invariably the most perfect and effective organs of the consciousness of society, and of the will of the community.

PART II.

THE STATE.

CHAPTER IX.

THE STATE AND ITS CONSTITUENT ELEMENTS.

§ 114. That moment of the organization of every society, in which it presents itself as independent, dominant, and capable of asserting its own conditions of life by force, forms always a distinct phase in the process of association; and whenever any particular society assumes this form, it appears as the state.

The state is properly a law-creating and law-maintaining society which proclaims and asserts the conditions of its existence in connection with its own conduct and that of its subjects through commanding, permissive, and prohibitory rules. Hence, it is independent of other societies of a subordinate character, which find a place within it by adapting themselves to the spheres marked out to them by the state, with due regard to their respective strength and to the degrees of importance of their respective aims, as well as to its own principles of law. The antagonism between the endeavours of every subordinate society to realize, as fully as possible, its fundamental principle, and between the efforts of the remaining societies—and consequently also the society of the state—to assert their vital

interests, which form the central principle and common tie, must nevertheless continue; but the contest arising therefrom is now limited by the regulations of the law of the state, which, representing the results of a trial of strength between the ruling society and its subordinate societies, becomes the fixed exponent of the balance maintained between these subordinate societies and the state by the state itself. Accordingly, the notion of the state and that of society may be contrasted, if we define the former as a condition of structure reconciling the rivalries, securing internal peace and lasting quiet, and as setting definite limits to the various spheres of power within its bounds, and the latter as descriptive of a state of things brought about by the conflicts carried on for the purpose of accomplishing various vital objects; conflicts, during which every individual and social sphere endeavours to extend its rule as far as possible over others, and to use others for its own purposes, and strives to increase its own personal power by appropriating the force of others. This juxtaposition is, however, in truth, merely the contrasting of an ideal and perfect picture of the society, with the circumstances of its fermenting process of formation.

The society of the state, and the order created by it are, in point of fact, never complete and final in themselves, nor do they ever represent that regulation of absolute value which should entirely accord with the capacities and merits of the totality of the members of the state. For the undue preponderance of particular individuals and circles can never be entirely eliminated, founded as it is upon the march of historical development, or upon some momentary advantage, and necessarily containing, as it always does, elements of injustice and of further changes and dissensions. On the other hand, every concrete society, even in a subordinate position, to the extent of its being definitely established and provided with a fixed sphere, moderates selfish activity, that is, the activity of its members drawn to separate interests, and adapts it to the circumstances of their social existence. This, then, is the essential difference

between the state as a ruling society and other societies within its sphere, which, in forgetfulness of the fact that the state itself is a society, and that the various subordinate societies also differ in nature from each other, have been frequently and improperly designated by the collective name of society in their sum total alone. Whilst the ties of the subordinate societies and the interests and sentiments insuring their maintenance are, apart from the protection of the state extended over them, of a purely voluntary, internal, and moral character, the ties of the society of the state are consolidated by its organized power, and the stability of its order is secured by external force. Consequently, whilst in societies not yet organized as states, or lapsed from rule, the influence of moral and economical agencies upon the relations of their members is unlimited, in the society of the state it is strictly defined by the law adapted to the dominant conception of the proper interest of the state, and created by it in its ruling capacity.

§ 115. The fact that a certain society has become dominant undoubtedly proves that it has passed through and beyond the preparatory stages of development, that its individuality has assumed a definite shape, that it has the consciousness of its conditions of existence, and that its organism is so far advanced as to be able to secure the acknowledgment of its will. Accordingly individuality, self-consciousness, and the capacity of resolving and acting constitute the essential attributes of the state. The degree of their development is not the same in every state, but it is indispensable that they should rise above that level, by falling short of which the society might be incapacitated from asserting itself in its struggle against other societies, and from becoming the society of the state.

The effectiveness of these attributes may change, still they can never reach the full height of their ideal perfection except in an ideal of a society of universal humanity, where every human interest would be asserted in a proper degree and harmoniously; such a society, however, has as

yet hardly ever extricated itself from the lowest stages of development. That perfection would require that the state should be thoroughly informed as to its own circumstances and conditions of existence, and should exclusively and entirely shape its conduct in conformity with these; in such a case law, too, would present itself as ideal and final, and the only fitting society to form the state would be one composed of elements having reached their most perfect and ideal forms, that is, of individuals embodying the fullest capacity for association, and the attendant qualities.

In truth, however, every state, like every individual, knows only in part,—to the extent of the experience it has acquired, and to the extent of its ability to make this experience available in its organism,—its vital relations, its sphere of interest, and the conditions of its existence and progress. Hence, every state is guided in point of fact in the assertion of its individuality, and in the regulation of its activity, only in part by its true and properly recognized interests, whilst in other respects it is likely to acknowledge the paramount influence of such interests as it erroneously supposes to be vital. This circumstance accounts for the imperfection of every concrete system of law, being a consequence inevitably ensuing from the fact, that the state necessarily falls short of the perfection of its ideal.

§ 116. Accordingly, the definition of the notion of the state as being equivalent to that of a dominant society discloses at once the elements composing its frame.

The nature of the state is, like that of man, twofold: material and spiritual. The body of the state is the sum of those component parts which are united in the dominating society, its spirit is the total of that consciousness and will which conceives the aims of the community, marks them out, and strives to accomplish them. Just as the human soul is the result of the interaction of the different intellectual and moral functions of the individual, and not a distinct force outside these, but a notion formed by way

of abstraction of all that which presents itself as permanent in individuality and as uniting it into a whole, even so is the spirit of the state. It is the abstract expression of those forces which answer the sum total of the functions of its organism, and direct the recognition of its individuality, and is comprehended in the idea of the sovereign power of the state. Hence, the sovereign power is not a mysterious subject which might be severed from the state itself, but a general personification of the sum total of the conception and the activity of the state as far as it has become self-conscious and asserts its functions self-consciously. Indeed, the comparison between the state and the individual may be followed out even further. The inseparable connection between the sovereign power and the organism of the state, the necessity of certain organs for rendering the embodiment of its manifestations possible, and the dependence of its unimpaired power upon the sound condition of its actual society are all identical with the relation subsisting between the soul, the body, and the organs of the individual.

§ 117. The analysis of the materials of the state may be carried on ultimately to the single individuals embraced within its periphery, the totality of whom form the body of the dominant society, seeing that, indeed, a multitude of men furnishing its members enters as an essential requisite into every definition of the notion of the state. And since the individual from his own point of view has his distinct and independent aim, and bears an absolute value in the eyes of human conscience and faith, and, consequently, of every religious and metaphysical system, and is regarded as directly and personally responsible, and since, in addition, the relations of the individuals with each other as private persons, and again with the state, are most conspicuous in every state and law of a higher order, it follows, that every theory of the law of nature and of the law of reason represents the state as being directly composed of the mass of individuals, and, basing the explanation of its rise and organization upon the conscious

and voluntary agreement of these individuals, accounts for this conclusion simply upon the principle of consent and of aggregation. But since, in truth, the state is a definitely developed society in a dominant position, and as every society above that of the lowest grade is not merely a collection of the individual units forming its component parts, but an organism arising from their various groupings in conformity with their complex relations; and since, besides, every society of a higher order embraces several of an inferior, whose interests form the complement of its own; seeing also that not those persons alone are members of the state who clearly comprehend the fundamental principle of its society, but those as well who are drawn into its sphere in connection with the interests of the subordinate societies embraced within the state; and since, finally, even those who consciously recognize their position in relation to the state do not shape their conduct entirely from the consideration of the state, but allow their activity to be also influenced by custom, instinct, individual aims, and the aims they have in common with smaller circles—it follows, that the state structure can only be properly conceived of as a fully-developed organism of a complex and multiple composition. In such a state-structure the ultimate elements, the individuals, are connected with the whole, some immediately and some through smaller combinations in subordinate social spheres, which are either the remaining fragments of societies that have fallen from dominion, or are parts of such as are in course of development. Hence it also follows that the mere fact of individual existence is not always tantamount to membership with regard to the state, and that every man is not fitted to be a member of any conceivable state; in order to be qualified as such, his interest, or rather its conditions, must be directly or indirectly connected with the fundamental principle and interest of the dominant society. Thus we find that a member of a state, the dominant society of which is one of kinship, must either be a real blood-relation

or must be fictitiously supposed to be such; that only he can be a member of the communal state, who is a "citizen;" that a member of a state which has the amassing of wealth for consumption as its object, can only be a person who is permanently fitted either to oppress or to be oppressed; that a member of an ecclesiastical state must be a believer; and, finally, that a member of a national state must be possessed of the sentiment of its nationality.

In thus establishing the organic character of the materials of the state, we are also furnished with a clue to the solution of another question, which has from the very first engaged the attention of the philosophy of civil society. All the Greek writers thoroughly investigate the subject of the proper number of the citizens of the state, and attempt to fix it with precision, either by means of mathematical principles and combinations of a mystic character, as Plato does, or else from the standpoint of the requisite unity, and of the possibility of co-operation and government, as is done by Aristotle. The dream of universal rule over the world, to the realization of which the Roman Empire acknowledged but one obstacle, namely, that of geographical difficulties, and to which subsequently the Church, and later conquering empires aspired anew, led writers to lose sight of the connection between this question and the essence of the state. Moreover, the necessary limits of intercourse and of the possibility of supervision and of the executive action incident to government, seemed to point at the influence of strictly external circumstances alone as of importance in determining the number of the citizens of a state. In truth, however, even admitting that the effect of these agencies cannot be doubted, and that numerous other factors connected with this question, such as the influence of the density of population, of a common language, and of territorial circumstances, are all reducible to these agencies, yet the character of the principle of the society of the state and, in connection with it, the degree of the development

of its organism, will still always be mainly conclusive with regard to this matter. For every society, according to its different nature, may extend to a different sphere, and the relations of the dominant society to its own subordinate societies as well as to the surrounding dominant societies, that is, states, and their acknowledging the same vital principle, or one of a different character, are, ultimately, the real causes that determine the limits of the sphere embracing those who belong to the particular society, and restrict their mass.

§ 118. The fact that human existence is impossible in the absence of natural economical agencies, leads us to distinguish further component elements amongst the materials of the state.

Of these factors, the territory is one of the first importance: permanent settlement, that is to say, absolute rule over the territory, being a necessary condition of any advanced social life. Societies of the lowest order could no doubt exist for a time without fixed dwelling-places, and we even find in history records of such primitive, transitionary, and quite imperfect state-formations, which lacked the intimate tie of territorial permanency. Yet amongst populations living by the precarious pursuits of hunting and fishing, and even amongst nomadic populations, there arises, at a very early period, a religious as well as a political notion of intimate relationship with the places of their abode, and, amidst their very wanderings, we find them keeping steadily before their eyes as a paramount aim the acquisition of some country, and their final settlement in it. With the introduction of agriculture and of tribal life, and at the first dawning of the interest of local contiguity, the importance of a home affording sustenance and security was recognized, and gave rise to an inseparable connection between the notion of rule over a certain territory and that of the state; notions which, becoming almost identical, created the idea of country as being co-extensive with the state, and as palpably presenting to the mind the sphere of life of the society as well as its actual conditions.

From this time forward this connection never ceases, although we find that, with certain state-structures, especially the feudal ones—which owed their formation to the fact that the Church was only partially dominant—the connection between the state proper and the territory was not immediate, but established through the agency of inferior circles, which, however, owing to this very function, assumed to themselves some of the characteristics appertaining to the state. Thus, in the communal, the conquering and the national state alike, the character of the relation of the sovereign power to the individuals is admitted to apply incontestably to the territory also, which in this way figures as one of the invariable elements of the state.

§ 119. The constituent elements of the spirit or soul of the state are, again, the conditions of the establishment and assertion of its sovereign power, which find their outward embodiment in the structure of the state, that is in the connection of its component parts and in the sum of those institutions through which the consciousness and the will of the state are declared and applied. And, just as, in the case of natural organic beings, the manifestation of the spiritual qualities takes place mainly through the intermediary of one organ, namely, the brain—the action of which, however, demands the co-ordination of the activity of the remaining organs of the body, and generally fails for want of nourishment without the co-operation of the external senses—even so, the realization of the spirit of the state is chiefly accomplished by that conspicuous organ in which the sovereign power is centered. This latter, again, when alone and isolated, can neither take form nor stand, but requires the combined action of the organs ramifying through the whole body of the state, each organ having its distinct function in conformity with the circumstances of the life of the state. Those rules which set forth the order of these institutions and that structure, and which point out the mutual relations of the elements of the state, and the extent to which, and in

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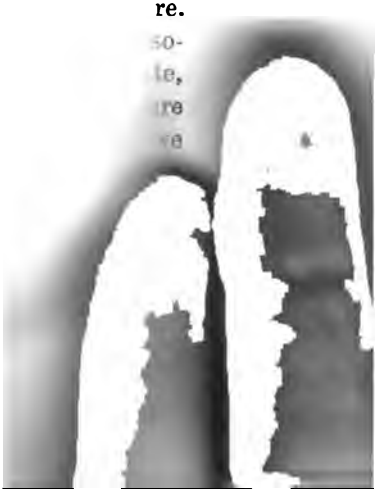

combinations of these capable of figuring as dominant interests. Thus the consanguineous, the tribal, the communal, the conquering, the ecclesiastical, and the national states become successively crystallized from social formations in the process of known historical development, and they can be followed in the changes arising from their mutual action upon each other. In proportion, however, as these states advance and correspond to societies of a progressively higher order, they become step by step more completely qualified to develop the attributes of their condition as states, although none of them are able to accomplish this entirely at the beginning of their rule. All are, in organization, at first behind the antecedent state, which has been longer and perfectly established, and only in course of time attain their utmost fulness of stature and strength of frame.

§ 120. If, however—leaving now out of the question the degree of perfection of the states now actually existing and of those that have actually existed—we do not endeavour to analyze exhaustively all the elements of the state, but merely to point out those common to all states, and characteristic of the proper notion of the state, distinguished as such from the society, the fundamental principle of the dominant society—which is inevitably found in every state, although varying in its nature—is, owing particularly to this variety, lost sight of, and the notion of the state becomes confined to those characteristics, which are of a merely formal character, and which bring into view the individuality and the capacity for action of the state, and its external independence and limits, as well as its internal absoluteness and order. These charateristics are the sovereignty, the constitution, the structure, and the government of the state, constituting the features of the state, as such, exclusively, and attaching in no wise to any other form of society. The state, therefore, according to such an abstract notion, becomes independent of all its peculiar social contents, and can be conceived as distinct from the society filling up

its framework and furnishing its materials, and as an independent organism.

The state may thus be characterized also as distinct from its society from the point of view of its functions, not indeed with regard to the whole sum of its activity and aims, which embrace also those of the society, but with reference to its efforts in the conception, creation, maintenance, and assertion of the general conditions of social co-existence. Every dominant society, indeed, as far as it is dominant, is bound to watch over the conditions of the community itself, in order to secure the interests of the community. If, therefore, amongst these conditions, there are special ones which vary according to the particular sphere of interest and connections of the dominant society, there are others again, both formal and general, which include the materials furnished by the whole community, and are identical in every dominant society. These may be ranged under the points of view of the co-existence and co-operation of the members of the community, of the order of their relations, of their proper contribution in the matter of the interests of that community, of their discipline, and of their capacity of being of service in the affairs of the state. The state, by virtue of its dominant character, is bound to establish and to maintain the conditions having reference to the foregoing circumstances, but the nature of these conditions is always dependent upon the society which supplies the materials of the state. The state, thus regarded as the personification of the society, is that structure which creates and maintains the law of the society in every case, leaving on one side the question of its contents and nature. For, since the creation and maintenance of law is an absolute duty, the dominant society, in its capacity as a state, must always perform it, whatever may be the nature of the social principle it subserves. The question we now examine is not one referring to the kind of aim which may be paramount with regard to a certain society and its law, but turns mainly upon the point whether, admitting any kind of aim, coercive activity in general is

necessary to preserve the independence and the order of a given mass of mankind within a given territory.

§ 121. Hence, the peculiar attributes of the state as a dominant formation—in contrast to those of the society, conceived strictly as supplying its materials—are its well-defined external sphere, its absoluteness, its independence, and its permanency. The first of these attributes arises from the fact that its consciousness, formed with regard to its sphere and its conditions of life expressed in rules of law, are embodied in positive institutions. Its absoluteness, an emanation of the dominant character, is derived from the subjection of all component parts to the coercive force of the sovereignty, since the subordinate societies are compelled to adapt themselves to its frame, whilst the state itself is formally not restrained by considerations for the former. Its independence as to other dominant societies is the result of its equality with the latter, springing from the identical nature of their tasks. Its permanency, finally, is due to the fact that its formal character remains the same, in spite of the changes to which the society contained within its sphere may be subjected. Indeed, any society, as such, is permanent, in comparison with single individuals; for, the realization of every social vital interest must extend beyond the career of a single generation, nay, frequently of several generations. The form and external frame of a state, again, remains unaffected by the change of the society upon which it is founded, that is, unaffected by its being supplanted by another, provided that the continuity of the society within the state-organism is not broken, and that the substitution for the society which formerly supplied the state with its materials by another different society takes place without the semblance of a disruption of the state and the overthrow of its sovereignty. Hence, the state, regarded from a formal point of view, appears to be enjoying perpetual life. This is, however, but a superficial semblance, for, in point of fact, every new principle, on becoming dominant, gives the impulse to a new current of life, and transforms anew, though

slowly and imperceptibly, it is true, the corresponding structures and spheres of activity. Thus at every period of change, the factors in the life of the state which are transmitted from the past seem invariably to preponderate, especially because those dominant law-creating and law-maintaining functions, which are indispensably necessary in every human community, remain unimpaired as such.

The course of life of every state is, nevertheless, also subject to various phases; it has its decline and termination, and its end may be brought about not only in a violent manner by external shocks, but by internal disease as well, although some blow from without is generally the immediate cause of its death, when internal weakening has already wrought its effect upon the body of the state. But in the same way as the spark of life in an individual becomes extinct in consequence of organic disease, although he may have at his disposal the external means necessary to sustain life in abundance, so the state perishes, if its society no longer possesses vitality, nor rests upon an interest still vital. Whenever the members of the state become deficient in the consciousness of the aim of the community, to a degree incompatible with the maintenance of the state; whenever the readiness and ability for sacrifices die out within them, and whenever the state itself is no longer able to assert its will, to direct the activity of its organs, lacks coercive power, and becomes, in fact, unequal to the sphere of its existing society, it then falls to pieces and ceases to be a state. Its formal independence cannot survive the absence of its internal materials; indeed, the continuity of the structure and of the organism of the state depend upon the social development being unbroken, and all casual displacements taking place by imperceptibly slow degrees.

§ 122. In the same way that the structure and government of the state and its actual sovereign power and constitution do not come up in concrete cases to their ideals, so the attributes of the state scarcely ever

show themselves in history in their full measure, but present themselves in a very great variety of differing gradations.

It is often a matter of difficulty to establish the precise line, below which the existence of the state or the dominant character of the society ceases, or above which the organism of a society may be justly called a state-organism. It is often, indeed, hardly possible to determine with any precision or accuracy the sphere of the state in the case of certain confederacies, federations, and unions which present themselves in various aspects—sometimes international in character, whilst at other times referring to the relation between state and subject—or in the lax relations obtaining between dominant sovereign societies and their dependencies. Thus, in the case of primitive social formations, and especially in that of the consanguineous society, where the attributes of state manifest themselves merely in those measures which relate to the preservation of peace amongst the groups of kinship, the absoluteness and independence of the state are rarely asserted to the extent which we connect with the modern notion of a state. Hence, some writers are even induced to deny to these formations the name of state, and to style them merely "federations of peace." The attributes of independence and absoluteness are, again, considerably lessened in their effectiveness in those instances, where the dominant society performs directly but a small portion of the duties of government, and is not only in the habit of entrusting subordinate societies, as agents, with most of these duties, but employs special and only partially subordinated societies for functions, such as are in these days regarded as essential functions of the state, as happened in the case of the ecclesiastical state and the institutions of feudalism. Finally, where, owing to the operation of internal or external causes, the changes in the social principle are frequent and rapid, the duration of the existence of the state falls also considerably short of the modern notion of the attribute of permanence.

§ 123. Accordingly, the notion of the state may be defined from two points of view, either as we regard it as comprising the entirety of the conditions of the state, in which case it embraces the materials and the whole sum of the component elements of the state, or as confined to the formal characteristics of the state, and bringing out the attributes connected with the functions of rule and incident to the antagonism between the public power and its subjects. The definition is, besides, frequently amplified by taking in the description of the aims of the state in an exhaustive manner, or by touching upon their external characteristics, or by embracing the fundamental propositions of the theory of the origin of the state. Theoretical definitions, in general, do not develop directly one from another, but seem to be rather short abstracts from the whole sum of the currents of thought forming around their subjects, which are in general connected with each other according to the order of the periods and of the societies to which they appertain, and not in their particular special features. In the definition of the notion of the state, especially, two alternating tendencies can be traced: on the one hand, the attempt to give special prominence to the individuality of the state as a sort of mysterious personality, and, on the other, to lay particular stress upon the combination of its members and upon its national structure. The first of these tendencies is observable in Plato, in whose works the state appears as a human being of lofty proportions, representing in a single unity the harmonious sum of all the virtues. In the fundamental conceptions of Aristotle, again, we discover a tendency to view the state as a complex structure, although his definition, which is to the effect that "the state is the community and union of kinships and village communes for the purpose of procuring and attaining a perfect life, affording content in itself," brings out into bold relief the circumstance, that in his philosophy the aim figures as the final, and thus also as the principal, cause. In this definition we can find moreover an exhaustive description of the

materials of the communal states of the age of Aristotle, and at the same time admire the wonderfully accurate sense of perception shown by him in pointing out the social elements of the state; a discrimination which has for the most part been neglected by subsequent writers. Cicero calls the state the thing of the people; adding that the people is not any kind of association of men congregated together in any manner, but such an association of a mass of men, as is united in consequence of a mutual understanding with regard to the law, and of the common advantage: in another place, "the union and association of men united by law." In this definition the state is not only reduced immediately to individuals, but the law itself is not as yet identified with the will of the state, nay, it even appears to precede the latter. These features are to be accounted for, however, by the circumstance that Cicero had already fully accepted the idea of the law of nature, and that he was, moreover, familiar with the notion of communities higher than that of the state—a notion conceived partly in the spirit of the Roman historico-philosophical ideas, and partly in that of the Stoic views—such as the national society connected by community of language, the universal human society founded upon the community of human reason, and the highest order of society formed by general and just reason, the community of men and the gods. These last ideas find no echo in St. Augustine. With him the notion of state fell under quite a different criterion; he supposes the definition of Cicero not to be applicable to the human state, but will confine it strictly to the Divine state, since, according to his views, an association of a purely human nature is necessarily wanting in true law and justice, and the earthly state serves merely as a provisional and imperfect union for peace, unable to properly satisfy the aspirations and endeavours of its members. In St. Thomas Aquinas, the antagonism between the transmundane and the human state is tempered by the conception of the Church as an intermediary institution; whilst the Church is represented

as founded directly upon Divine institution, and not merely and principally as an institution of a higher rank and of a human character; the state figures as a strictly human community of the highest order, which, in the words of the angelic doctor, "tends to the result, that human life should satisfy itself," and "it therefore stands higher than any other community the human mind may know, establish, or assert, and every other community derives from the state." Dante advances one step farther, and, placing the ideal state, the imperial monarchy embracing the whole world, by the side of the Church, as the absolute instrument of Divine intendment, defines the secular state to be "the monarchy which stands above all things existing in time, and to which the measure of a temporal condition can be applied." Bodinus, on the other hand, adopts a perfectly secular and rational standpoint, giving no thought to the mysteries of unity and absoluteness. According to him "the state is the multitude of families and their common affairs rationally ordered by the sovereign power"; and, indeed, we find that numerous writers of that period, especially those inclined to patriarchal views, return to the Aristotelian definition, inasmuch as they do not speak of individuals, but only of families and communities as being the constituent elements of the state. Grotius, again, adheres to the definition of Cicero, but completes it by giving prominence to the state in its entireness, in speaking of the state as "the perfect union of free men associated for the purpose of enjoying rights, and for the sake of the common advantage."

Hobbes is the first writer who, in the most emphatic manner, asserts the exclusiveness of the state and the absoluteness of the sovereign power. The state with him is "the mortal god, the one person of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient for their peace." Spinoza adopts a similar defi-

nition, and conceives the state as the entire body of the sovereign power. The writers on the law of nature during the seventeenth and eighteenth centuries follow with but few deviations the definition of Hobbes. It is worthy of remark, in this connection, that Pufendorf mixes into this definition the expression of a moral person, which circumstance has additionally promoted the ordinary conception of the state as a legal personality, and especially, according to its interpretation by the civil law, the conception of the law of the state from the point of view of the civil law, so much so, that in Schlözer we find the state at last designated merely as a very complicated machinery.

According to Kant, "the state is the mass of men uniting under rules of law," or "the sum of the individuals united in the relation of members, viewed in its relation to such members." This definition fully renders the mechanical conception of the state, and establishes its strict connection with the claims of practical reason. Opposed to this definition are those of the German historical school, in which the state is described as "the bodily form of the spiritual community of the people," or as "the organic manifestation of the people," whilst in Hegel's definition that "the state is the reality of the moral idea, the realization of concrete liberty, the moral whole," the endeavour from a higher standpoint to reconcile the strictly historical and purely rationalistic views becomes apparent, as also a return to the Platonic conception which had given the impulse to the successive attempts at defining the notion of the state. The almost simultaneous, but otherwise independent, distinctions made since that time between the state and the society, especially by Hegel, Herbart, and Krause, have given a new direction to the definitions of the notion of the state, and Stahl, Mohl, Bluntschli, Trendelenburg, and Ahrens, all of them endeavour to make the relations of the state and of the social spheres, or of their totality and of their tasks, the basis of their definitions, whilst those who adhere more closely to

the modes of thought of Hegel and of the historical school attempt to show its connection with the notion of the people or of the nation, and thus try to embrace within the definition of the state the essence and characteristics of the national state actually dominant at this day.

CHAPTER X.

ORIGIN OF THE STATE.

§ 124. The efforts to determine the notion of the state have led also to the investigation of the question of the formation of the state, which owes its significance to these efforts. Viewed apart, the question of the formation of the state appears to be a strictly historical one, possessing a purely scientific interest. But, in point of fact, there has hardly ever been a proposition in public law which has given rise to more vehement disputes than this question, nor one to which practical consequences of wider bearing have been attributed. As long, indeed, as the formation of the state appeared only in connection with strictly theoretical discussions concerning the nature of the state, as was the case through all antiquity, it attracted comparatively but little attention. Yet, from the moment that an antagonism between the notion of state and that of church arose, the inquiries instituted with regard to the inherent rights or to the derivative and mediate nature of the state invested the question of the origin of its authority with extraordinary importance. Subsequently, the assigning of reasons for the limits and moral preponderance of public power, as contrasted with the claims of individual liberty and of private aims, rendered the solution of the question as to how human communities arose, and what the origin of their concentrated consciousness and capacity for action might have been, of additional value. Besides, in consequence of the identification of the notions of the natural, the perfect, and the just, which had become habitual, the formation of the state

presented itself at the same time as the question of the original, natural, and consequently of the perfect, form of government. In connection with the conception of the state, according to which it was derived directly from the will of individual men, the discussion of the origin of the state presented itself, besides, as the solution of the problem how it was that such consciousness and force could spring from the will and consent of the individuals, so as to exceed, not only in the matter of quantity, but also of quality, the combined consciousness and force of all the individuals; whilst, as a consequence of the fundamental conception of the state as essentially a totality and an individuality, the secret of the sources of the mysterious soul of the state and of its absoluteness came under discussion.

§ 125. It is obvious, however, that the historical solution would, in neither of these cases, prove satisfactory, even if it were fully corroborated by evidence. From the point of view of science, all that happens, or that has occurred, is of the highest importance, and serves as a basis for the establishment of theoretical laws. On the other hand, from the point of view of the man who is pondering over what ought to happen from certain articles of faith which he lays down, or certain propositions accepted as incontrovertible, historical fact is a matter utterly secondary and of an entirely incidental character. Yet the conception of the origin of the state prevailing throughout the whole of the Middle Ages and through the greater part of our own age has been invariably connected with some metaphysical proposition accepted as an *a priori* truth. The propositions, that every individual has an absolute value and purpose of his own, and is consciously free, on the one hand, and, on the other, the conceptions of the Divine institution of the order of the world and of its embodiment in some certain external organism, were received as such indubitable fundamental doctrines, that no theory was considered to have established its justness, unless it was able to prove that its results tallied with these propo-

sitions. As a consequence, the problems concerning the formation of the self-consciousness of the community, as well as touching the sources of authority and the original form of government, presented themselves, properly speaking, in a metaphysical garb, and their solution necessarily involved the reconcilement of some seeming logical contradictions. This question, however, having been put forward in a historical form, the answers were also clothed in a historical dress, although their elements were not deduced from experience, but from hypotheses according with supposed laws of reason, and having the semblance only of historical facts.

§ 126. Indeed, history can give us no direct answer to this question of the origin of the state. For it is impossible to draw inferences from the changes occurring in the life of a state concerning movements which took place before the life of the state began, since history itself cannot extend backward beyond the existence of the state, namely, that community of life, of which history itself is one of the products. The origin of the self-consciousness of the state can therefore no more be determined by means of historical memory, than that of the self-consciousness of the individual can by means of individual memory.

New states have, it is true, arisen, and are continually arising before the eyes of history, but they are invariably formed from the elements of antecedent states, and under the influence of existing institutions having the characteristics of state. The origin of the state, therefore, without the attending influence of the state, is a question of a nature similar to that of the primary origin of life, which, under the name of equivocal generation, has busied the minds of men for centuries.

Every living being is, as a matter of experience, derived from some other living being; and though the mind might, with some show of likelihood, assume that life, the currents of which are subject to the laws of inorganic matter, at one time sprang from the inorganic world, or even if it eventually did become actually possible to produce this

emanation by human forces, yet there can be no room for doubt, that this could never be accomplished directly in the form of a manifestation of organic life of the highest order, or of calling into existence individual self-consciousness. It is evident, that the observation of the formation of life would only be possible, if conditions and circumstances were reproduced, approximate to those, under which life originally arose, and which must have inevitably been quite different from such as have formed during the long course of the existence and development of life. The laws of the formation of life cannot thus be derived from the phenomena exhibited by living beings now existing; we must look for them rather amongst the primary and most ancient conditions of life. It cannot be presumed that the first forms of its manifestation were the same which predominate in our own days; nay, it must be rather assumed that they were of the simplest kind, and tied down to the lowest degree of organism. By parity of reason, the origin of the life of the state cannot be ascertained on the basis of its present manifestations. We look in vain for the direct reflex of individual conceptions in the formations of state authority now obtaining, that is, the formations which have asserted themselves throughout the greatest part of history; thus, in order to arrive, by the aid of the genetical method, at a hypothesis approximating the truth, we must take our point of departure from the most ancient, the simplest, and the most general agencies of social co-existence and organization, and from the most primitive forms of their manifestations. Besides, the question must not be made to hinge upon the discovery of the precise moment of the formation of the clear and pure consciousness of community; since consciousness in communities, as well as in individuals, is but the heightened effect of such agencies as have already shown themselves at a lower stage in sensations, sentiments, and instinctive conduct, which are, in their turn, connected with mere impressions, and with immediate reflex activity by a continuous chain hardly divisible into phases. Nor must we

again forget that the awakening of consciousness becomes known to us only through its external manifestations, which naturally do not take place simultaneously with its subjective formation, but follow later.

§ 127. In the past, both those who proceeded from theological propositions, and those who adhered to the conception which endeavoured to derive the state from the voluntary agreement of free individuals in a state of nature, were always seeking an expedient which should enable them, without the hypothesis of pre-existing formations of state, to account for the origin of the existing and familiar structures of state, or to find out which that original state-structure was, from which the others were derived. In case they could not at the time discover it, they tried to ascertain and obtain it by inference from other existing states, and from the result of their researches, looked for an answer to their question, which structure of state was fitting in itself. As a result, they imagined that, if they succeeded in proving that every state really was formed and derived from below, they thereby achieved the triumph of democracy; or, again, if they proved the origin of the state to be Divine, that they thereby established beyond doubt the justness of monarchical doctrines. In this day, this investigation should be entered upon as being one simply of scientific importance, with a view to ascertaining in what manner the law-creating and law-maintaining organ detached itself within the sphere of the society, or, rather, how the state-organism became invested with those distinct attributes, by which it is seemingly enabled to endure as permanent and independent, in spite of the changes incident to the social materials filling up its frame.

The answer to our question, as last formulated, is furnished by the doctrine of the development of the societies, which points out at the same time those qualities and causes to be found in human nature, which have produced circles of association varying in degree and effectiveness.

Thus, every difficulty in the way of ascertaining the historical circumstances ceases from the very moment that the notion of the state is not identified with a certain absolute and established level of governmental activity, but embraces all such structures of state, as are of an order adequate to the nature of the society supplying its materials. Parallel with the process whereby the society, partially recognizing its vital interest, becomes conscious of its proper aim, and disengages itself from the sphere of general indefinite association which rests only on instinct, power, becoming stable in the hands of certain individuals, tends to develop a readiness in the others to submit to the stronger, and thus to enhance their authority, which, in a fitful and variable manner, had already instinctively made its influence felt in the simplest and lowest grade of social co-existence, even with creatures below the level of human existence. Various circumstances co-operated in the ordering and organization of the primitive social groups: the higher degree of physical force possessed by some, whereby the employment of physical compulsion is rendered possible, and, later, that of moral superiority in others,—the religious significance which was ascribed to extraordinary spiritual manifestations, especially by those who, being less cultivated, were less able to explain them,—greater frequency of the opportunities, and readiness for fulfilling the tasks of leadership,—the judgment which counselled voluntary subjection in consideration of advantages to be secured,—the effect of natural selection, which ensured the survival of those human groups with whom that disposition to obey, indispensable to co-operation, was developed in a higher degree, and which brought also about the extinction of the groups with whom that disposition was lacking,—and, finally, the habits of servility acquired by those who had been conquered. In proportion, therefore, as primitive social groups became more stable, and the necessity of defending the community more pressing, and as the opportunities and results of the interests of community multiplied, custom and tradition

also contributed to the establishment of authority. Thus, the consanguineous groups of a higher order present themselves, in their relations to each other, as well-defined spheres, and, individually, as internally articulate; and the same course of development, during which the consanguineous ties were replaced by tribal ones, and the latter, again, by ties of permanent local interest, manifests itself in those formations which are assumed by successively dominant societies. These societies thus become conscious of their new character, whenever they cease to be quite simple in their organism, and whenever their frame is filled up not merely by single individuals, directly connected with each other, but by the spheres of subordinate societies as well.

The notion of the state, and the directness of its powers, also become more clearly defined, and more highly perfected, whenever the constitution of the body of the state no longer permits the arraying of the material forces against each other, but, in lieu thereof, substitutes rules more and more general in nature; rules which refer not only to single actions and individual aims, but embrace general conduct and permanent interests. Differentiation as to the dominant organism therefore takes place at the same time that the interest of the society or community becomes distinguished from individual private interests, although, at first, the former may casually be identified with the individual interests of those who wield the power. But this can only be the case during the time that the means of securing the private interest of the ruling elements are at least serving to secure the existence of the society itself. And just as the most primitive interest of the society is of a most immediate and for the most part material character, so we find brute force generally to be the source of the power of the state connected with such society, and compulsion by violence the means employed to assert that interest. We see these coercive means only yielding to moral agencies, which demand a further differentiation of the organism, when the combination of the members of the society in the

tasks of the state increases, and their conduct becomes controlled by conscious conviction. The consciousness of the state with respect to its own circumstances, its activity, and tasks, increases uniformly with the growth of the consciousness of its own members with regard to their relations to the state. It may accordingly be justly stated that, in parallel ratio with the changes in the elements of the society, the state itself is continually being reconstructed.

Its first rise is connected with the appearance of the first interest of a society as such. After it has become dominant, every new social principle furnishes the power of the state with a fresh basis and form, and the corresponding organism again passes through continual changes, which are in harmony with the notion and ready reception by men of the end and aim of the society. We observe the stages of progress in noticing whether a larger or lesser degree of coercion, and material rather than moral agencies, are required to secure the conditions of co-existence, or whether the success and effectiveness of social co-operation may be safely entrusted to the voluntary and free combination of the members, based upon the conviction of their interest and upon their insight. In proportion, therefore, as the functions of the state-organism are exclusively devoted to the service of the public interest, does the antagonism between rulers and subjects, which presented itself in the beginning as the first sign of the formation of the state, also cease. Material force, the moral grounds of authority, the rational conviction of the citizens, as well as such instinctive and habitual emotions as may almost be called immediate and natural, being, as they are, agencies that have not passed through human consciousness, and, finally, the movements of individual liberty, each and all exert their influence upon the origin and formation of the state. This, although they vary in effectiveness under different circumstances, they always affect in such a way that, in states of a higher structure, the purely spiritual agencies become predominating. For, hand in hand with the transformation of the state, and with the development and perfecting

of it, as such, of its organism and of its sphere, their cause and their consequence, the individual and the social qualities of men, become simultaneously developed and perfected. Thus, in the course of this progress, the truth of the proposition first advanced by Aristotle, but frequently misunderstood, is proved, that the state existed before the individual; for the full notion of the individual can only be realized in connection with that of a perfect society, that is, the ideal state.

§ 128. But just as the perfect and ideal state is not possible unless in connection with the sphere of the most general society of the highest order and aim, which embraces all the other societies in a subordinate condition, and as every particular society and its state still consider themselves during the period of their rule as the most important and as final, even so the theory of the continuous formation of the state, and of the strict relativity of its organism, could only be established exhaustively and beyond all doubt by the light of perfect consciousness in connection with such ideal condition. For every society and form of government has a distinct theory of the formation of the state, in consonance with the different views of the world prevailing at different periods, and arisen in different communities, and within each of them, again, many detailed theories may be distinguished, all expressing dissenting currents of thought. These theories, therefore, admit of being classified according to their subject-matters; but it is more instructive to view them in their historical connection, which sheds also light upon their peculiar meaning and mutual relationship.

The most primitive and simplest theory—a theory which, properly speaking, is not a growth of scientific thought, but a combined result of propositions of faith, of interpretations of mythological allegories, of referring the effects of natural forces to the inconceivable and unaccountable, and of the natural expression of feelings of devotion and obedience—is that ingenuous and essentially theocratic theory which regards the state as the result of the

personal care and action of the Divinity. Such a theory is that preserved by the Greek and Roman poets and writers of legends, by the mythology of the German tribes, and by the traditions of the Jewish people. In all written records, however, this theory presents itself shorn of its crudest features, and in a much milder aspect. At times, it appears in a purely allegorical form, and again as interwoven with patriarchal notions, in connection with which it sometimes assumes a shape in which it no longer attributes the foundation of the state directly to the Deity itself, but to demigods and heroes appointed for that purpose. In Scripture, we meet with the idea of voluntary agreement on the part of man, in the shape of the covenants entered into by the Deity with His cherished patriarch or His chosen people.

§ 129. The philosophical theories of antiquity proceed from modifications of the theocratical theory, which arose, partly from its being re-cast into an historical form, which also appears rational, and partly from metaphysical interpretations.

A most attractive statement of almost all of them may be found in Plato, whose various works contain—with a view to the practical application of those theories—three different accounts of the formation of the state, which, though diverging, are yet connected with each other. Plato, in his "Statesman" and in "Critias," proclaims the immediately Divine origin of the state; not, however, referring to the actual and temporal state, but to the ideal and pristine state, which constitutes also the final aim. In accounting for the origin of historical states in these dialogues, as well as in his "Republic" and in the "Laws," he represents that, owing to some extraordinary and epochal convulsion of nature, a mighty change had suddenly taken place in that primary condition of humanity which answered to the poetical conception of the Golden Age. This change, he avers, caused the destruction of a large portion of mankind and only a few shepherds survived the catastrophe, and became again the progenitors

of the present human race, which increased in number, but lived, at first, isolated from each other, in the seclusion of family, and with purely patriarchal institutions. Subsequently, when men had multiplied, and their occupations and their capacity and means of defence had proportionately increased, the families gathered into village communities, and afterwards into cities, whence—partly through the influence of powerful men, and partly by common consent —states of various structures have arisen. In discussing, in his "Republic," the rationality and the necessity of the rise of states, he urges, by way of explanation, that society arises from the necessities of man; adding that, if we wish to render to ourselves a proper account of the origin of the state, and to construct it artificially, we may do so by saying that the feeling of these wants and the possibility of satisfying them by trade, attract the individuals to one place, and that thus the formation of the state originated, though necessity was, in point of fact, the real constructor of the state. He further says that, owing to the diversified nature of man, and to the fact that one man is more proficient in a certain occupation than another, and that necessity cannot wait, a division of labour ensues, which can be effected solely within the frame of the state. In the "Crito," in the dialogue of Socrates with the laws, he mentions contract as the foundation of civil obedience, but does not refer to it as an agency in the formation of the state.

Thus in Plato may be found every possible theory of the origin of the state in its germ, beginning with that of Divine institution, and passing to the historical theory and to that of contract—being dialectical explanations in a historical form. If these explanations seem less one-sided than the subsequent theories, this is owing to their very incompleteness, for they more readily admit subsequent currents of thought than more detailed and more rigorously constructed theories.

§ 130. Aristotle's explanation of the origin of the state is, in conformity with his own notion of the state, con-

nected with the historical traditions of the formation of the communal state. According to him, the family and the village community form the antecedent phases of the development of the state, the character of which is that of a naturally necessary process. The principles of the power of the state, which manifest themselves in various ways, have been already previously asserted at the various stages of the rule of the family and of its economy, where their prototype may be discovered. The spirit of association, or of friendship, forms the foundation of every society, either on natural grounds, as in the case of the family; or from the point of view of the sum of common aims, and consequently of virtue, as in the case of the various associations and of the highest community, the state. Accordingly, virtue, the idealized and, hence, metaphysical notion of aim, on the one hand, and the notion of the natural forces inciting thereto—another abstraction of a metaphysical nature—on the other, give to Aristotle's theory of the state a peculiar character. Its influence upon later theories was essentially due to the position which connected the family and the community with the rise of the state. In it the former are represented, not as dialectical antecedents, but as the historical antecedents of the state. Thus was laid the foundation of that most insipid of all pseudo-historical theories which refers to the stages of the family, of the commune, and of the state, as the sole phases in the historical development of community, and as actually arising directly from each other by way of simple aggregation. This is a theory with which we meet in the schoolmen; in the German writers representing the transition to the writers on the law of nature, at the beginning of the modern era; in some of the writers who, during the eighteenth century, occupied a standpoint antagonistic to that of the school of the law of nature; and in some of the less conspicuous writers belonging to the modern school of the law of reason.

The Greek philosophical schools which sprung up after

Aristotle supposed the state to be an artificial structure, and its origin thus ceased to be an object of interest. The Stoics look upon it as accidental and secondary, and search for the spirit of nature only either in the universal world or in the individual; whilst the Epicureans view the state, without any ampler explanation, in the light of a simple natural fact, although they consider law to be derived from agreement in connection with utility. Cicero, on the other hand, returns again to this question, leaning partly on Aristotle and partly on that partly utilitarian current of thought which sees, in the securing of life and property, an explanation of the formation of the state; yet he, too, on the whole, finds the real cause of its origin in the social nature of man.

§ 131. The new Christian conception of the world demanded a new theory of the state. St. Augustine created such a theory, in consonance with the tendencies of thought prevailing during that period of Christianity, when the persecutions suffered by the Church at the hands of the secular power were still fresh in the memory of men. His theory deduces the state from the imperfection of man due to original sin, which is symbolized by both the original and the most important historical illustrations of its formation, which refer to the fratricides Cain and Romulus. Indirectly, however, he represents the state as being the realization of Divine intendment for the purpose of exalting the Divine and perfect city, as contrasted with the human and imperfect city. Both these thoughts, as expressed in this theory, bore fresh fruit in the course of the Middle Ages. The connection of the secular state with the corruption of human nature seemed to afford a reasonable ground for the conception of its inferior dignity, in comparison with that of the Church; and the last trace of this conception is echoed back in the theory of Mariana, which is otherwise founded on contract. The theory of the mediate Divine origin of the state, again, developed into the claim that the Church, as deriving its power directly from the Deity, yielded up a portion of it to

the state; and the instance of the establishment of Charlemagne's empire by virtue of his coronation by the Pope, was cited as a historical proof of this proposition. Besides, the feudal forms of government of the Middle Ages seemed to constantly justify the doctrine of the indirect origin of all concrete power, and of the immediate and Divine origin of the power of the highest order alone,—a doctrine illustrated by the instance of the two luminary bodies of the heavens, and by the theory of the two swords. At the same time, the unity of community was accepted as the rational foundation of rule. Starting from this, St. Thomas Aquinas discusses the possibility of the formation of the state, supposing original sin had never been committed, and, reviving the Aristotelian theory, he supplements it by arguments in favour of the superior vocation and call of the Church, by virtue of which the head of the Church was justified in holding to account the rule of the state *ratione peccati*. In the course of the disputes which afterwards arose with regard to the independence of the secular state, this attribute, as well as a directly Divine origin, was invariably claimed for the ideal imperial state alone; whilst other secular states were, without exception, represented as preparing the way for the former, or as dependent upon it, and thus of a secondary and delegated character.

This indirect theocratic theory of the Middle Ages, which may be styled the hierarchical one, manifested itself again in a historical form in the patriarchal theory; and the latter is continually used, by way of elucidation, when proving the former;—whilst it serves, at the same time, as an intermediary between these theories and the pseudo-historical theory supposed to be Aristotle's.

According to this patriarchal theory, the patriarchal power attaches to the head of the family and also to the head of the state. Conferred by the Deity upon Adam, it descended through him and Noah as a heritage to the patriarchs and to the kings of later ages. In connection with this, the notions of private law, also associated, under other circumstances,

with those of the feudal law, likewise began to filter into the question of the origin of the state.

§ 132. This again gave rise to the patrimonial theory of the origin of the state, which, however, never entirely eliminated the theological and patriarchal elements which, being akin to it, were constantly mixing with it.

The patrimonial form of government shows itself as a degenerate offspring of the feudal, owing to the fact, that rights of a public character had been invested with the attributes of private rights, and that thus their continued authority was secured, whilst the duties connected with them were ignored. This state of things originated in the circumstance that, after the idea of the supremacy of the empire or of the papacy had been dropped, the several princes still maintained their rights unimpaired, as to those below them, whilst their responsibility, as to those above them, had ceased. Beginning with the latter half of the sixteenth century, the political doctrines became independent of the religious elements that had formerly entered into them, yet not free from the theological propositions involved in them. The Divine origin of royalty then became a dogma, especially in those Protestant countries in which the impulse to the Reformation had come from above, and it was only subsequently accepted by the French royalty and the Gallican Church as a doctrine of their own. This theory is fully expounded by Robert Filmer in his work entitled "Patriarcha," the main propositions of which are to the effect, that the kingly power is derived through primogeniture from Adam and Noah, and that the patriarchal power being a private right, the kingly power, which is but its continuation, is also a private right, and further, that the territory of the state is the private property of the king. This train of thought—besides occurring in the theories of the French ultramontane and legitimistic school, where, though outwardly somewhat obscured, and adorned with rhetorical rather than philosophical appeals, it presents itself simply as a return to the ideas of the Middle Ages—can be found in its latest shape

in Haller's theory, propounded in his "Restoration of State-Science." According to him, all power is of Divine origin, and asserts itself both as a public right and as a private right, by virtue of the protection it extends to the weak, which they are bound to accept, and hence the power of the state does not essentially differ from the power of property founded upon private right. Thus sovereignty is the result of relations of power expressed in innumerable contracts, the consequences of Divine establishment, manifesting themselves in the actual state of things, and in its sanction by undisputed possession during a long period of time.

§ 133. This series of theocratical theories, and such as were connected with them—in which attempts were constantly made to trace the principle of authority back to a source of highest and indubitable authority, by the aid of such secondary proofs as always chimed in with the characteristics of the institutions of the time in which the particular theory was broached—naturally gave rise to a parallel series of antagonistic theories proceeding from the principles of human liberty and of rational and conscious conduct. Whilst, therefore, in the theocratical theories principal stress is laid upon the ultimately simple nature of the individuality of the state, and upon the impossibility of analyzing its sovereignty, the theories embracing the opposite views were built mainly upon the idea of the independence of every single individual. Such views, indeed, may be traced long before they were systematized into a theoretical form.

The communal republics of antiquity always derived the foundation and efficacy of their institutions from the consent of the citizens, not, indeed, theoretically with regard to the origin of states in general, but merely with regard to themselves. The memorials of Athenian and Roman liberty have, throughout all history, served as the most powerful arguments against the inherent nature of royal and papal power as claimed by royalty and papacy; and, indeed, even according to the views of the jurists of the

Middle Ages, the justification of all imperial power lies in its having been transferred to the emperor by the people, by means of the *Lex de Imperio*. This forms the first, and, as it were, the historical nucleus of the theories of contract developed during the sixteenth century in opposition to the hierarchical and patrimonial doctrines. Further elements very soon accrued to it, such as those derived from the facts that, in the constitutional states of the Middle Ages, composed, as they were, of estates, the rights and liberties of the different estates or orders were often expressed in the form of mutual compacts between them and the sovereign, and that the relations between the feudatories of a higher and lower order, as well as their rights and duties, were also established, formally at least, by contract. Hence, whilst the memorials of antiquity bequeathed the germs of the sovereignty of the people to modern times, the mediæval institutions have left behind them the notion of contract as a means of enabling those of a lower order to secure their rights as against those of a higher class. Various passages in classical lore, as also in Holy Scripture, fed this notion.

The contract between the citizens and the laws, mentioned in Plato,—the consent of men as the foundation of all law put forward by numerous Greek writers, and also by Cicero and other Roman writers who followed in his footsteps,—the Divine covenant with Noah, and afterwards with the Jewish people, and with several of its kings,—all tended to corroborate the same view. When, therefore, during the political commotions of the sixteenth century, a school of writers arose in the Monarchomachi, who, like Languet, Hotman, Boëtie, Poynet, Buchanan, and, subsequently, Milton, were endeavouring to prove the limited nature of the kingly power and the original liberty of the people, it was but natural that they should have recourse to the idea of a contract between the king and the people as an equal foundation for the rights of both. No proper systematic theory, however, was as yet framed by these writers, with the exception of Milton, who belongs to a later

period, and whose conceptions extend also fully to the theoretical question. To accomplish this, other elements were still wanting, such as the hypothesis of the state of nature, and the special investigation of the grounds of the binding power of contracts, borrowed from the Roman law.

§ 134. The idea of a state of nature is also of ancient and mythological origin. The placing of the age of perfect happiness in the remotest past is connected with that peculiarity of the human mind, observable from the earliest days of mankind, which makes man imagine all that is ancient, and the authority of which he has acknowledged since his childhood and venerated in its traditions, to be greater and better than the present. Thus the state of perfect happiness was conceived and represented in the mythological fables as the Golden Age, when man and the gods came into direct contact with each other, although this legend was always followed by an intimation of an era of corruption succeeding the happy age, and preceding ordered human society. During that period when the notion of the Deity was identified with that of the absolute and of nature, this trite fable obtained a philosophical significance, and, subsequently, the condition outside society arising from nature was referred to by the Epicureans and by Cicero as the subject-matter of a purely abstract proposition, serving to fill up the logically necessary picture of the days preceding ordered human society. The notions falling within this sphere received, however, a new qualification in the Stoical conception. Life in conformity to nature, is, according to the Stoics, the aim of all who would strive towards perfection; the laws of nature, reflected in the human mind, became the rules of the law of nature; and that individual existence was regarded as superlatively noble, and as free from all artificial trammels impairing the attainment of perfect wisdom and bliss, which had become independent of all ties binding it to any special state, and thus was not attached to any sphere of a lower order, but immediately belonged to the highest sphere connected by the natural

and universal bonds of general humanity. On this ground it was proclaimed that every man is, by nature, free and equal, and that moral dignity and responsibility of man applied strictly to the individual alone, and not to the citizen as such; and these propositions were accepted as fundamental doctrines of applied philosophy. The hypothesis of the state of nature obtained, however, a practical value only later, after it had undergone a transformation with the help of Christian theology, and been identified with the human condition before and after the state of original sin, according to which it represented, in a heightened degree, either the condition of well-being or that of predominating evil. Hence the writers who endeavoured to vindicate the Church, derived the origin of the state from the latter condition, whilst those who advocated the independent equality of the state, amongst whom we must also count the patrimonial writers, derived it from the former condition of mankind.

This assumption of the twofold state of nature, one imperfect and replete with ills, and the other contented and happy, occurs also in the writers on the theory of contract, who are disposed to take either the dismal or the cheerful view, according as they either occupy the standpoint of absolutism, or, at all events, that of the overwhelming importance of the sovereign power, or as they assumed the task of vindicating the supremacy of the people. The ready reception of either of these views was, however, influenced also by other circumstances.

During the sixteenth and seventeenth centuries, after the discovery of new quarters of the globe, the unfavourable impressions were still vivid in the minds of those who had contemplated the weakness, the cruelty and the misery of the savages, as exhibited to the eyes of the cultured Europeans who had without any great effort reduced them to subjection. An eager desire prevailed to remain in harmony with theological conceptions, and with the traditions contained in Scripture, and to prove the corruption of human nature. But with the approach of

the eighteenth century, and during its further course, faith in the original goodness of human nature gained more and more ground, being additionally kept alive by a disposition to contradict biblical traditions, and by a belief which obtained, owing to the highly-coloured accounts of travellers, in the happiness of the inhabitants of the isles of the South Sea, who were supposed to have been discovered in a state of nature.

§ 135. The essential features, however, of any conception of the state of nature, features which are also common to every explanation of the origin of the state based upon the state of nature, consist in this, that the individuals in a condition of nature were always imagined as independent, free, and not connected by any tie with each other except that of blood, but yet were invariably invested with the same mental qualities which individuals possess as a heritage of historical development. It was reserved for the psychological and genetical methods to point out the contradiction contained in this last proposition, but these methods could not begin to assert themselves until the early part of the nineteenth century. It was owing to this, that it struck no one as being strange, that the transition from the state of nature to that of society was accounted for by a mere contractual agreement; although the theory of contract, so called in, was indeed itself but of very late growth in the development of the Roman law.

The notion of the *naturalis obligatio* and its contrast with the *civilis obligatio* were interpreted and generalized in a manner altogether out of keeping with the meaning of these terms in the Roman law, but were connected with the doctrines about the *vestimenta pacti* of the commentators and of the canonists, with whom at last every "*pactum nudum*" was considered a contract, in consequence of the element of "*fides*" involved in it. The essence of the whole doctrine of contracts was reduced to this, that agreement by contract was the only means by which the will of independent individuals possessing equal rights could be mutually subjected to each other, or one person's will

subordinated to that of another, and was the only condition upon which it could be conceived that individuals—disregarding all reference to any superhuman or human power—might be brought under a common rule which, without being based upon fraud or violence, should be recognized as perfectly rightful.

The theory of contract, upon this basis, and following this current of thought, is first met with in the works of three writers at the end of the sixteenth century and at the beginning of the seventeenth.

Mariana, in his work entitled "*De Rege, et Regis Institutione*," after dwelling in detail upon the state of nature as well as upon the evils which had sprung from the increase of mankind, states it as a fact "that, pressed by those who were more powerful, men entered into a social bond, and began to look about them for some man, conspicuous for justice and honesty, under whose protection they might hinder internal and external injustice, and might, by the establishment of equity, tie down with an even law the highest as well as the lowest, and, through them, those of the middle class. From this arose for the first time city communities and the regal majesty, which, in olden times, could not be obtained through riches and bribing, but only by self-restraint, innocence, and virtue. Hence arose, from the recognition of the necessity of many things and from the consciousness of infirmity, human rights, by which we are men, and civil society." Mariana, however, neither states his theory in a cogent and legal form, nor does he deduce from it any other consequences except those referring to the subordination of the state to the church, and those justifying the right of revolution and of tyrannicide. This last circumstance, especially owing to the connection which the order he, as well as his work, belonged to, may have had with the murders of William of Orange, of Henry III., and of Henry IV. of France, and with the attempts at murder aimed against Queen Elizabeth and King James, cast such a cloud over his work, that its further literary influence was out of question.

Hooker, in the first book of his "Ecclesiastical Polity," sets also forth "how nature finds out such laws of government as serve to direct even nature depraved to a right end. All men desire to lead in this world a happy life; that life is led most happily wherein all virtue is exercised without impediment or let. But in the world there has been always much wickedness, much misery. To take away all such mutual grievance, injuries and wrongs, there was no way but only by growing into composition and agreement among themselves, by ordaining some kind of government public, and by yielding themselves subject thereto; that unto whom they granted authority to rule or govern, by them the peace, tranquillity, and happy estate of the rest might be procured. Men always knew that when force and injury was offered they might be defenders of themselves. They knew that, however men may seek their own commodity, yet if this were done with injury unto others it was not to be suffered, but by all men, and by all good means, to be withstood. Finally, they knew that no man might in reason take upon him to determine his own right, and according to his own determination proceed in maintenance thereof; inasmuch as every man is towards himself and them he greatly affecteth, partial; and therefore that strifes and troubles would be endless, except they gave their common consent all to be ordered by some whom they should agree upon. Without which consent there were no reason that one man should take upon him to be lord or judge over another; because although, according to the opinion of some very great and judicious men, there is a kind of natural right in the noble, wise, and virtuous to govern them which are of a servile disposition, nevertheless, for manifestation of this their right, and man's more peaceable contentment on both sides, the consent of them who are to be governed seems necessary." But neither was Hooker's book destined to exert any general influence in Europe, owing to its late publication, to its being written in English, and to its referring more especially to the constitution of the Church of England.

Of quite a different importance was the inserted by the work of Grotius, the third of the mentioned above, in which also the state of nature taken from the traditions of theology; but conappears at the same time as forming the only foundof society to be reasonably conceived. Thus he says: "Since it is the law of nature that man should stand to contracts (for indeed some mode of obligation was necessary, and a different natural mode cannot, in reality, be imagined at all), it is from this very source that civil laws sprang. For, those who joined some community or subjected themselves to one man or a greater number of men, either expressly promised, or, in the nature of the case, must be conceived as having silently agreed, to follow that which has been established by the greater part of the community, or by those into whose hands power was placed." He then proceeds as follows: "Human nature itself, which urges us, even if we lack nothing, to seek mutual association, is the mother of the law of nature; the obligation arising from conviction, which derives its force from the law of nature, is, again, the mother of positive law, and accordingly nature may be said to be, in a manner, the grandmother of this (civil) law." In another passage he says: "But the law of nature is joined by utility, which serves as an occasion for the civil law," and adds, later on, "not the utility with reference to single communities, but with regard to the universal community, nor considerations of present advantage, but of the advantage of the future generations and of all time to come."

As may be seen from these quotations, the theory of Grotius concerning the origin of the state and of law is but Cicero's, in a somewhat more precise form, a remark which applies also to his mode of determining the notion of the state, which, too, leans upon that of Cicero. He is thus an eclectic; sociality, as a fundamental attribute of human nature, serves him as a point of departure; a proposition which had been accepted, in fact, ever since Aristotle's expression, that man is a "ζῶον πολιτικόν," by

Cicero and every writer throughout the Middle Ages; yet with this difference: whilst the mediæval writers connect this social quality of man with Divine purpose, it figures with Grotius as a final and fundamental fact. What is said by him with regard to considerations of utility fostering, in a secondary way, sociability, is mentioned also by Cicero, and the only thing which is peculiar to Grotius is, that obligation by contract is represented by him emphatically as being the only possible obligation which affords an exclusive explanation of the transition from the natural condition to the civil state, and hence of the original formation of the state. It was not, however, to these varying shades of thought that the work of Grotius owed its fame and the importance it obtained. It is rather the theory of the formation of the state, as advanced by him, which was indebted for its significance to the fact, that it served as an introduction to a complete theoretical and practical system which, not only from a scientific, but from a practical point of view also, gave an entirely new effect to international law, and developed and applied the theory of law and of the state in matters of such immediate and general interest, that it was thereby enabled to occupy a place amongst the agencies of universal civilization. This accounts for the fact, that subsequent schools endeavoured to connect their own theories with Grotius' theory of sociality, in order to lend to their reflections some of the lustre surrounding his great individuality. And all the more so, because Grotius, although he gave prominence to the propositions of the theory of contract with regard to the foundation of the state, did not himself deduce therefrom the political consequences in detail, and thus his followers were enabled to justify their labours in the same field upon the ground of perfecting and improving upon the work of their illustrious predecessor.

§ 137. The same task, however, had already been accomplished by Hobbes quite independently of Grotius. In his works entitled "*De Cive*" or "*The Philosophical Elements of a true Citizen*" and "*Leviathan, sive de materia, forma et*

potestate civitatis," or "*The matter, form, and power of a Commonwealth, ecclesiastical and civil*," he derives all the doctrines of public law from the phenomena of human nature, upon the ground of the assumption of an original social contract. He starts from the proposition of the equality of men, which he regards, not as a result of theoretical reasoning, but as derived from immediate experience, since, to use his own words, "when all is reckoned together, the difference between man and man is not so considerable, as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For . . . the weakest has strength enough to kill the strongest. . . . And as to the faculties of mind . . . I find yet a greater equality amongst men as that of strength. For prudence is but experience, which equal time equally bestows on all men in those things they equally apply themselves to." From equality proceeds mutual diffidence, because "two men desire the same thing, which nevertheless they cannot both enjoy." From diffidence, again, arises war, the condition of the possibility of mutual hostilities, as "in the nature of man we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory." The inconveniences of such a condition of war are numberless, for man is forced to rely upon himself as against his hosts of enemies, who leave him neither time nor occasion to properly attend to his wants. That such is the condition in a state of nature is proved by the precautions men take for their own safety, even in times of peace, and is further proved by the evils springing from it in the case of savage peoples, and those minor ills, but yet exceeding injuries, which arise from wars between nations. In this condition of war "of every man against every man," there is neither justice nor injustice, which "are qualities which relate to men in society, not in solitude." Hence, in a state of nature, the right of nature alone prevails, which "is the liberty each man has to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life." Naturally

every man has a right to everything, but to enjoy such a right he must have peace. Therefore the first and fundamental law of nature is "that every man ought to endeavour peace, as far as he has hope of obtaining it; and, when he cannot obtain it, that he may seek and use all helps and advantages of war." From this fundamental law is derived the second law of nature, to the effect that "a man . . . may be contented with so much liberty against other men as he would allow other men against himself." This may be done either by renouncing a right or by transferring a right, which practically, as regards man, amounts to precisely the same thing. The mutual conferring of right is called contract, and may be either express or drawn by inference from signs. The contract is completed when it has been performed; and it is incomplete, if a covenant be made wherein neither of the parties perform presently, but trust one another. In the condition of mere nature such a covenant, upon any reasonable suspicion, is void. But if there be a common power set over both, with right and force sufficient to compel performance, it is not void; only, however, with regard to man, for no covenants can be made with beasts, nor is it possible to make any covenants with God, without special revelation. Covenants extorted by fear are valid, and, in the condition of mere nature, obligatory, for they are made to escape from a greater evil, and hence there is no reason for their invalidity. A man's covenant not to defend himself is in all cases void, for he thereby deprives himself of the only advantage which enters into a man's covenant. For the same reason no one can be obliged to accuse himself, and a covenant to accuse himself without assurance of pardon is likewise invalid. "From that law of nature by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind," follows the third law of nature, namely, "that men perform their covenants made, . . . and in this law consisteth the fountain and original of justice." From this law spring the several other laws of nature, such as, fourth, that of gratitude; fifth, that of

mutual accommodation or complaisance; sixth, that of facility to pardon; seventh, that in revenges men respect only the future good; eighth, that against contumely; ninth, that every man acknowledge another for his equal by nature; tenth, that no man require to reserve to himself any right, which he is not content that it should be reserved to every one of the rest; eleventh, that of equity; twelfth, that of equal use of things common; thirteenth, that of acquiescence in determination by lot as to things which can be neither divided nor enjoyed in common; fourteenth, that of primogeniture and first seizure; fifteenth, that of the inviolability of the mediators of peace; sixteenth, that of submission to arbitrament; seventeenth, that no man be his own judge; eighteenth, that no man be judge that has in him a natural cause of partiality; and, nineteenth, that of the credibility of the witnesses; and the universal standard common to all these laws is comprised in these words: "Do not that to another, which thou wouldest not have done to thyself." These laws oblige the conscience always, but are obligatory in effect, then only, when there is security of mutual observation of the law. This security is afforded by the commonwealth, which is defined as "one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient for their peace and common defence." This one person, which may consist of one man, or an assembly of men, thus arises by way of covenant, and he is, as a consequence, absolute, unchangeable, and free from restraint, for otherwise he would be unequal to his task. This freedom from restraint is subsequently explained by Hobbes, and extended by him even to the freedom of thought and religion. Only in one instance does he allow it to be abridged, namely, that the commonwealth can compel no one to serve as a soldier; for, in that case, it would claim the risk of those very benefits of life, for the protection of which the original social contract was entered into.

It is obvious that, starting from human self-consciousness and liberty, the foundation of the state cannot be more thoroughly accounted for. In picturing the condition of nature, Hobbes exhausts all that can be said with reference to considerations of utility and expediency; and, indeed, as regards these doctrines of the theory, they, properly speaking, vary from those of Grotius and of the earlier writers but in their particularizing, and in the strictness of their logical sequence, except in one point; for with Grotius the endeavour to associate is made, especially by the interpretation of later writers, to embrace such movements of human nature also, as are not rational, but instinctive. We find besides in Hobbes, for the first time, a conception and enumeration of the laws of nature, clear and definite in meaning.

In case the theory of contract be accepted, the only doubts that may, nevertheless, arise as to its conception by Hobbes refer to the form in which it presents itself with him, and according to which he looks upon the necessity of security as absolute, and consequently upon the abdication of his liberty by the individual as also unconditional, and strictly identifies the state with the sovereign power of the state, and the latter, again, with the person or persons embodying the sovereign power of the state.

§ 138. The onslaughts which were almost immediately directed against the theory of Hobbes did not proceed, however, upon these grounds alone. The whole patrimonial school rebelled against his conception of the state of nature, as being replete with evils; his theory of justice and injustice being relative and positive, incurred also the displeasure of those philosophers of the seventeenth century who stood upon metaphysical ground. The extension of the state to the province of religion summoned into the lists against these views the Church, on the one hand, and those who advocated the liberty of thought, on the other. Finally, the doctrine of the absoluteness of the sovereign power, identified with the ruler, offended the susceptibilities of all those who clung to constitutional government and

liberty. Nevertheless—or, perhaps, for the very reason that he called forth such general hostility, and because he had advanced the disputed questions in such a sharply defined form—the theory of Hobbes had the effect of rousing into renewed activity the cultivation of public law, and its traces, in one point or another, can be met with in all subsequent theories, although its results were denied.

This may be remarked already in Milton, for although he makes no mention of Hobbes, and wrote his pamphlet in defence of the measures of the Commonwealth from a direct and practical point of view, yet he does not cease to insist that, in establishing the sovereign power through contract, men desired only to secure their liberty and rights, and transferred the sovereign power as a trust merely, which was not irrevocable, but might be taken back from a bad government, and the latter even called to account; and that, pre-eminently, the freedom of opinion and of religion did not fall within the province of the civil power.

Spinoza, whose theory is frequently ranged under one head with that of Hobbes, exerts himself also to maintain, above all things, the proposition last mentioned. The inviolability of freedom of thought forms the leading idea of his "Tractatus Theologico—politicus," and the same principle is again prominently referred to in his "Tractatus Politicus," the object of which was to deduce from the conditions of human nature the laws governing communities. The premises from which Spinoza proceeded are almost the same as those of Hobbes, except that the former connects the power of the law of nature with that pantheistic conception of nature itself which is peculiar to him. According to his theory, the law of nature consists of those rules of the nature of every individual, by which we conceive of any given individual as naturally definite with regard to a certain mode of existence and activity. Hence every one has a right to everything which he has the capacity and power to obtain, for which reason the laws of instinct alone determine the rights of men under the rule of nature.

This also gives an unrestrained course to every passion, to hostility, and to collision. It is not always in man's power in this condition to live according to his reason, which merely strives after the advantage and maintenance of man, but he is governed by necessity. Hence, springing from the hope of greater good, and the fear of greater evil, arises the association of men by contract; which, again, derives the reason of its validity from the benefits conferred by it. And, since man is freer, the more he follows his reason—a thought taken by Spinoza from the doctrines of the scholastico-theological school—liberty and self-preservation thus going hand in hand, and since he enjoys a greater measure of security in proportion as he combines with others, and obtains more rights and a greater amount of liberty the closer this union is, it follows, that the formation of the state by contract, and the rigorous observation of the latter, do not come into conflict with the law of nature. But no one, on the other hand, confers upon the sovereign power all his rights, and the full measure of his strength, and it therefore becomes necessary that the latter should be limited in its power, and that its sphere should be confined to those things wherein the sovereign power is able to assert its will, and not extended to matters, such as freedom of thought, in which it cannot compel obedience. It is evident, that this theory is one of contract, only to the extent of contract being the reasonable form of association, and that Spinoza's theory does not, in general, aim so much at giving an account of the origin of the state, as at explaining the phenomena of the state in the spirit of his pantheistic system of philosophy.

§ 139. The theory of contract, in reference to the origin of the state, only really became popular by that matter of fact view of it which was presented by Pufendorf. He, with regard to the condition of nature, attempts to reconcile the explanations of the propositions of Grotius with the reasoning of Hobbes, for although he does not look upon that condition as a state of war, but as one in which the law of love prevails, yet he considers the peace afforded

thereby to be very slender and uncertain, and full of the anxiety of strifes and ills that may arise from envy and hatred. To avoid this condition of things, the state is established by the aid of two contracts and an intermediate resolution. The first and necessarily unanimous contract refers to the union, and is followed by the majority resolving upon a form of government, whilst the fact of the establishment of the state is accomplished by the second contract, relating to the actual subjection under the state.

The theory of contract remained unchanged in this form with Thomasius and his followers, and became a sort of official and generally-recognized doctrine of the school of the law of reason. Wolf returned to the simpler form of the theory, according to which the totality of men presents itself as the people, and the contract forming the state is not entered into by the individuals with each other, but by them with their whole sum-total; for which reason the sovereignty, after the state is thus established by contract, still belongs of right to the people as such.

§ 140. The treatises of Locke concerning civil government, in the second essay of which he treats of the origin of political societies, gave a much more decided turn to the theory of the origin of the state with regard to the doctrine of contract, and the development of the ideas connected with it, as also with regard to political life. Locke also starts with the state of nature as his first hypothesis, and he argues with great discrimination in favour of its being in reality actually and continually applicable, by observing, with reference to the objection of the lack of its traces in history, that history can remember it as little as it can the infancy of mankind. He adduces proofs for this statement from instances drawn from Rome and Venice, and from the examples of the Greek colonies and savage peoples, and by further observing that, as regards different persons, their entering society does not happen at the same time, but that they become, each separately in their turn, members of society as they grow maturer in age.

The law of this state of nature is the law of nature, or

of reason, which teaches every man that, since all men are equal and independent, no one should be injured by another in his life, health, liberty and property. Its security consists in this, that the enforcing of the law of nature rests in the hands of each particular individual, and that thus everybody is the possessor of judicial and executive power. The condition of nature is not identical with that of war, but the latter may very easily arise from it, and the avoiding of this is a great reason why men should leave the condition of nature and enter society, where every member is no longer his own judge, but the community becomes the fixed, permanent, and impartial judge, and the common judge of all, in conformity with rules equal with regard to everybody. The protection of property forms especially an object of uniting into a state, for without it the maintenance of peace would be impossible, the state of nature being in this very respect most defective in affording such protection. Whenever then, the mass of men, by the consent of every man, formed the community—another contract not being at all necessary to establish the state—it formed at the same time the community into a body possessing the power to act as one body, which means nothing else but the rule of the majority. For every body moves in the direction in which it is carried by a greater force, and the agreement of the majority is the greater force in this body.

Accordingly, every one, in agreeing with others to form a state under a common government, assumes the obligation towards every other member of that society to accept the determination of the majority, and to recognize it as final. And although men, in becoming members of the state, yield up the equality, liberty, and executive power which belongs to them in a state of nature, and place them into the hands of society, to the end that they shall be used for the good of that society, yet as this is done by every one with the intent of better guarding himself, his liberty, and his property, the society or state formed by men can never extend further than the common weal. Hence, whoever is invested with the sovereign power of the state is bound

to rule in accordance with fixed and permanent laws, which being declared and known to the people, must be administered through an impartial and upright judiciary; and is not permitted to employ the power of the community within the state except for the purpose of executing the law, and, without the state, merely to punish injuries done to it, or to defend it against foreign attacks. The rule of such a one over the lives and fortunes of the members of the people cannot therefore be absolute and arbitrary. Locke's theory may therefore be distinguished from Hobbes' theory of unlimited insurance, by being styled the theory of limited insurance. Its logical defect is the same which characterizes Hobbes' theory—without now adverting to the assumptions of the doctrines of the state of nature and of contract which were common to both—although it led to opposite results. Locke, also, identifies the sovereign power with its depository, the ruler, and finding it reasonable that the power of the latter should be limited, looks upon the sovereign power itself as limited, and thus confounds the limits of the right of the supreme power with the conditions of the expediency of asserting it. The popularity of Locke's theory did not, however, suffer from this circumstance; his work was held in veneration by posterity as justifying the revolution of 1688 in England, and his doctrines were highly esteemed as explanatory of the principles of British constitutional liberty.

§ 141. The theory of contract was formed by Wolf and Locke so as to correspond with the influence the people then actually asserted in public affairs, with the self-consciousness the people really developed with regard to public aims, and with the measure of liberty, embodied in the institutions, which had been attained. With Rousseau, however, who belonged to a later generation, we find the theory already going beyond the practical reception of its theoretical inferences, and formulating its own claims to be realized. In his "Discours de l'Origine de l'Inégalité parmi les Hommes," Rousseau had set forth that the state of nature, in which, according to him, man was not

conscious of his misery, and in which the conditions of his bodily and mental health had not yet been warped, is, in relation to man, that of happiness, and that all his greater ills have sprung from culture. In his work on the "Social Contract," he no longer rigidly adhered to this proposition, but it greatly contributed, nevertheless, to rouse the fervent aspirations prevailing in that age towards a return to the simplicity of nature, and towards the discovery of a system of laws under which it would be possible to secure the advantages of the supposed state of nature. From this point of view the investigation of the origin of the state presented the following question:—"How to discover such a form of social union, as would defend and protect with the common power of the whole the persons and rights of every individual united within it, and by means of which every one, after having united with the others, might still obey but himself, and remain just as free as he had been before uniting with the others."

The answer to this question is to the effect, that this can be accomplished by a contract, whereby every one of those who unite, parts with all his rights for the benefit of the whole community, and thus, every one obtaining the same rights over others as he transferred to them as regards himself, has an equivalent for the thing he lost, and has, over and above, the strength of the whole to protect that which he has.

The social contract, therefore, consists in this, that every one enlists his person and all his strength in the service of the community under the supreme direction of the general public will, and enters into the body of the whole as its inseparable component element. From this social contract arises the sovereign power, or the sum of the whole, in which every one has, so to say, covenanted with himself, and is therefore bound in two directions, namely, as a member of the sovereign power with regard to the particular individuals, and as a member of the state with regard to the sovereign power. But the sovereign power, as such, cannot, under any circumstances, be bound with

regard to any one. Hence it follows that the sovereign power, being composed of individuals merely who are its component parts, neither has, nor can have, an interest antagonistic to theirs, for it is impossible that a body should wish to injure its members, and thus the supreme power, by the mere fact of its existence, is always that which it should be. On the other hand, again, the individual may have his private and distinct interest, but he is bound to surrender it, or he may, otherwise, be compelled to do so; for the general public will is always direct, and aims at the public interest. This, however, presupposes that it is, in fact, the general public will, and not simply the will of everybody. The difference between the two notions consists in this, that the general public will arises directly from the sum of the particular will of each individual in such a manner, that those slight differences which present themselves more or less in the different individual will of each, balance and neutralize each other, and thus that which remains is the general public will clearly and indubitably relating to the public interest; whereas the will of everybody, on the contrary, frequently arises from the adding up of the will already previously formed by the individuals as united in distinct groups or societies founded upon some special interest, and manifesting itself through them, and as presenting fewer groups of will, consequently exhibits fewer differences and is less general—producing a result thus differing from the public will. The general public will, therefore, is co-extensive with the whole formed directly out of the individuals, and is the only sovereign power and ruler. The contract calling the general public will into existence is the only true contract in society; for the establishment of the government, of the organ of the supreme power, is not a bipartite compact, but is accomplished by a simple commission revocable at pleasure, and the rights of the state and of the whole belong, consequently, in no wise to the government.

§ 142. The contradictions which characterize the theory contained in the "Contrat Social" are rendered

apparent, in thus presenting its propositions in all their nakedness, and bared of their rhetorical flowers and Rousseau's passionate appeals. We are, first of all, struck by the two senses, antagonistic each to the other, in which the notion of liberty is presented. Liberty denotes man's independence of others, when mentioned with reference to the condition of nature, but liberty when spoken of with reference to the state, has a widely different and a restricted signification, merely that of the right of man—considered as a participator in the supreme power—to the small fragment of power over others which falls to his share in consequence of his having a part in the public will, whilst he has lost all power over himself, his individuality becoming in every respect merged in, and subjected to, the public common power. Hence it was that when the theory of Rousseau was, during the French revolution, in all its rigour applied in the doctrines of the Jacobins, it led to the most intolerant state-despotism, the currents of which might indeed be changed by the continual revolutions, but which, in itself, remained stern and uncompromising. For, although the supreme power was looked upon as revocable at any moment, and those who administered were regarded only as provisional instruments, yet, as long as the sovereign power itself was invested with the attributes of unity, indivisibility, and infallibility, and presented itself as the expression of the unanimous opinion of the society, every deviation from its views, every opposition to its ideas, must have necessarily appeared as an attack upon the foundations of society and as the greatest wickedness. Liberty, on the one hand, is considered as inalienable, and the social order, on the other, as a sacred right upon which every other right is founded.

The occasion of the social contract is given prominence to, as being one upon which justice replaces instinct in man, in that it gives to his actions a moral character they previously lacked, and which snatched man from his dumb, limited and brutish condition, and made him a rational and

human being, who, in exchange for that mere instinct, under the sway of which to act is slavery, obtained civil liberty, property, and moral freedom. And yet the same theory conceives the individuals who were, upon that very occasion of uniting, in a condition of nature, as being perfectly self-conscious, and as freely keeping before their eyes their rational interests.

History in this case, too, has proved that the practical and immediate effect and importance of ideas does not depend upon their truth; at least, not upon the sense in which they were conceived as truths by their authors and propagators, but upon their aptitude for being able to express, not merely conclusions of individual reason, but, wants felt by some large groups of men. The doctrine of the sovereignty of the people was that, which rendered the theory of Rousseau attractive, not because it had been satisfactorily proved, but because he replaced the notion of the state, a notion which had well-nigh merged into that of the ruler, by the notion of the nation, and insisted upon the absoluteness of the aim of the state, as being the public aim; whilst the lack of logic in his doctrine was made up for by the pleasing nature of his reasoning.

§ 143. It was, therefore, natural that, when the theory of contract was again investigated by Kant from a purely scientific point of view, its practical and positive elements, the historical improbability and logical incongruity of which was undeniable, were put aside. Kant, having made his point of departure the hypothesis of men, all equally self-conscious and free, obeying law they had themselves made,—law in which practical reason asserted itself,—did not inquire into the question as to how in reality the state originated, but only how its origin was to be rationally conceived, starting from these premises. In this connection he says: "The original contract, as uniting every particular and private will existing in the people into one common and public will (for the purpose of rightful legislation) need not by any means be postulated as a necessary fact (nay, it is impossible as such).

For should we, for the purpose of considering ourselves bound by any existing civil constitution, have to prove from history, before all else, that a people into whose rights and obligations we have stepped as their descendants, had at one time really performed such an act, and had left us, either orally or in writing, a tradition or document to that effect? This, however, is but a mere idea of the reason, possessing nevertheless an indubitable (practical) reality in this respect, that it obliges every legislator to enact his laws in such a manner as they might have originated in the united will of the people, and to look upon every citizen as if he had concurred in this will by his vote. For this is the touchstone of the rightfulness of every law.' The original contract itself is defined by him in the following manner. "The act by which a people forms itself into a state, or rather, properly speaking, the mere idea of the act, by means of which alone its legality can be conceived, is the social contract, according to which people collectively and singly give up their external liberty, to resume it at once as members of a common being, namely, of the people regarded in the light of the state. Nor can it be contended that man, belonging to a state, has sacrificed a part of his inherent external liberty for a certain purpose, but only that he has completely divested himself of his savage, lawless liberty in order to find his liberty again unimpaired in a legal dependence, that is, in a condition of law, since that dependence springs from his own proper legislative will."

Here we find the original social contract already represented merely as being indispensable to that ideal condition, which serves strictly as a standard for theoretical explanation and practical application; and it becomes an abstract notion to such a degree, that it eliminates from the notion of man and from that of the state everything that can possibly be concrete or of historical reference, and is deprived of all claim to experimental reality. Beyond this form, therefore, the theory of contract could not

develop. This, however, is also indicated by the tendency observable already in part, in all the preceding theories, but carried out in Kant exhaustively and consistently, namely, to represent contract as the only foundation of the formation, and as the original form, of not only the state, but of every other human institution as well, thus reducing to contract not alone the sovereign power, but also property, the family, and inheritance; since, indeed, contract is the only relation by which two or more individuals, viewed in the light of their mere will, can be, in any way, connected.

§ 144. It was thus inevitable that the theory of contract—which claimed, on the one hand, to shape life anew from a one-sided point of view and in accordance with the rude rigidity of a general theory, and had, on the other, become, in its metaphysical abstraction, shorn of all its palpable elements — should produce a reaction which showed itself, at first, accompanied by just and exhaustive arguments, in Burke, and, subsequently, in the German historical school.

Almost simultaneously with Rousseau's dissertation concerning the origin of inequality amongst men, there appeared Burke's "Vindication of Natural Society"; in which, in the shape of a parody on Lord Bolingbroke's anti-religious works, he ironically demonstrates that, if we accept individual reason as unconditionally paramount, all religion proves untenable, and every historical form of government productive only of the unhappiness of mankind, and that thus the political institutions or any kind of human progress must be looked upon as absurdities. He frequently reverts, in later years, in his speeches and letters, to this idea, saying that, as every society has developed but slowly, we can understand its spirit and explain its institutions only by taking into consideration experience and tradition. Finally, in his "Reflections on the Revolution in France," he touches upon the subject of the doctrine of the origin of the state, and lays down the points of view of historical judgment as follows: "Society is indeed a contract. Subordinate contracts for objects of

mere occasional interest may be dissolved at pleasure, but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and moral natures, each in their appointed place. This law is not subject to the will of those who, by an obligation above them, and infinitely superior, are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bonds of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles. It is the first and supreme necessity only, a necessity that is not chosen, but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy. This necessity is no exception to the rule; because this necessity itself is a part, too, of that moral and physical disposition of things, to which man must be obedient, by consent or force; but if that which is only submission to necessity should be made the object of choice, the law is broken, nature is disobeyed, and

the rebellious are outlawed, cast forth and exiled, from this world of reason, and order, and peace, and virtue, and fruitful penitence, into the antagonist world of madness, discord, vice, confusion, and unavailing sorrow."

This fundamental idea, that the mere concurrence of individual interests is just as insufficient to account for social co-existence, as reasoning drawn from the individual human mind is unable to explain it, occurs also in the doctrines of the German historical school of law. Savigny, their most illustrious representative, argues that, "if we inquire into the origin of the state, we must seek for it in the same higher necessity and in a creating force developing outwardly from within, to which we must attribute the origin of law altogether, and this, in general, holds good not only with regard to the life of the state, but also as to the special form which the state assumes with any people. For the creation of the state is but another mode of creating law, and indeed its highest." The people, according to Savigny, is the subject of the creation of law, as an operating individual subject in which the law is created, not by every individual member, but by the spirit of the people, living and operating in common in the particular individuals. This same train of thought—which, in accounting for the origin of the state, keeps particularly in view the character of the modern national state, and looks upon the peculiarities of the people as original and primeval, and thus capable of being explained metaphysically only—occurs in Hegel, yet not in connection with the origin of the state, but its development, every pantheistic conception involving, indeed, that existence and development are equivalent ideas and phenomena.

§ 145. After the possible effect of all such elements contained in the theocratical, patriarchal, and patrimonial theories, in the theory of contract, and in the metaphysical and historical theories, as may be conceived singly as agencies of the origin of the state—as that of Divine authority, that of material force, that of property, hallowed by time, that of free agreement, that of spiritual conscious-

ness, running parallel with the order of the world, and that of tradition—had been one by one exhaustively particularized, subsequent theories could only be eclectic, or might endeavour to advance on the path of organic development. Thus there may be observed in Stahl a last attempt to combine the theological with the historical theory and with that of contract. He holds that "every sphere of the human will is an essential factor in the foundation of the state, but does not found it by itself and directly. The state arises neither from the will of the individual nor from that of the people as a whole (since it owes its origin altogether to an unintentional act), just as little as original law springs from the spirit of the people. It is historical providence, a factor superior to human will, that directs the numberless deeds of innumerable people towards the one result, the formation of the state, and that in a certain manner. This again is only the Divine Spirit which creates and maintains states; God, namely, according to the age and according to the people engrafts it on the hearts of men, what order to establish and what aims to pursue. And even if individuals and the masses, the rulers and those who obey, oppose this course, the power of the community over individuals and the power of doctrines surviving generations ensure the victory, and in whatever relation men may stand inwardly to the Deity, its command is inevitably fulfilled to a greater or lesser extent with regard to the general external will."

The theories of organic development, as advanced by Krause, and in connection with Krause's theory by Ahrens, and later by Bluntschli and Trendelenburg, endeavour to connect the origin of the state with the laws of social development, and the measure of their fitness is furnished by the extent to which they are able to disclose the harmony between these laws and between the phenomena of history. In proportion, therefore, as such a theory succeeds in more accurately distinguishing the organization and sequence of the different fundamental principles of society, and of the spheres of human interest, and

in drawing by inquiry nearer to the particular workings of the institutions of community adapted within each of these spheres to the various degrees of assertion of self-consciousness, it will also embrace more elements of truth. Indeed, we might absolutely acknowledge only that theory of the origin of the state, which could historically elucidate the entire course of development of the state, and by the aid of which the general laws of development could be applied to all those cases in which states were formed at all. This, however, cannot be attained, and for this special reason. Societies and states which have as yet arisen, do not by any means exhaust the sphere of all possible societies and states which will certainly be realized in the future, and, owing to this, no state answering the ideal could at any time be actually formed. Accordingly, there is no moment in the life of a state in which it could be asserted, that the state has reached its final form, and that it will never again pass through a new phase of development. Hence, every theory of the formation of the state can only be of relative value.

CHAPTER XI.

THE AIM, THE SPHERE OF ACTION, AND THE IDEAL OF THE STATE.

§ 146. HAND in hand with the question of the origin of the state, and how and from what cause it arose, there presents itself the question of its aim, and the purpose for which it was formed. For, from the moment that the state was considered to be artificially constructed, as the result of conscious activity, either Divine or human, the purpose directing that activity necessarily became a subject of investigation. Indeed, fitness of purpose is nothing more than a consideration of human interests, whether these are imagined to have been previously marked out by the Deity or to be conceived by nature, or whether they are drawn from the experience of mankind, and are developed in human consciousness. Hence, as soon as man looks upon himself as the centre of the world—a primary psychological phenomenon which, originating in man's primitive self-assertion and egotism, does not cease to accompany the development of his consciousness, until he gradually learns to know that he only arrived at this conception by involuntarily objectizing the factors of his own activity, and that his existence in the world of phenomena is but co-ordinate with all other beings, in subjection to the general law of causality—he seeks, in the first place, and in the realms of nature, the means fitted to design. Consequently, teleological explanation is always, from the first attempts at philosophizing, the principal foundation of every scientific exposition, until the moment arrives when the theory of final causes is replaced by that

of agencies, and the latter again by the theory of inevitable antecedent causes.

The philosophy of law and civil society, therefore, embraced also the aim of human communities, and especially the most conspicuous of all, that of the state, as being the most important aim; with a view to learning its nature, which presented itself at once as both theological and metaphysical, in the theocratic and pantheistic theories of the origin of the state, and as derived, in the doctrines of contract, from human will. The determination of the aim of the state may be also attempted from the positive point view of the degree of importance attaching to the existence and to the operation of the state with reference to particular human interests and to their whole sum, thus identifying this question with the problem of the desirable extent of the sphere of action of the state. In case the complete solution of this problem is accomplished by the creation of a state-ideal, which appears appropriate to the just organism of the state, and, hence, to its internal homogeneousness, and to embody the means of effecting the satisfaction of the collective sum of individual aims, the aim of the state must also present itself, at the same time, as the standard of the perfection of the state. This aim, consequently, appears as an object not only of curiosity with reference to the investigation of the secrets of the purpose embodied in the order of the world, but of important knowledge concerning the direction of human consciousness and activity. Whilst, therefore, philosophy, in its earlier stages, proceeded from the notion of the aims, for the purpose of pointing out the essence, sphere, and functions of the state, the aim of the state at this day figures as serving to express the relation subsisting between the state and the individuals constituting its members, as well as the societies composed of the latter.

§ 147. It is according to this view obvious that—inasmuch as the state is not for the most part artificially constructed, but is formed without any conscious proceeding

with this design on the part of men—the state is self-purposed, as containing within it a proper individual will and a consciousness of its own, and as being, at the same time, an inevitable form of human co-existence. In whatever stage human community, or rather the organism of the society constituting its frame, may be, it cannot subsist without its conditions of social co-existence passing into consciousness, and being framed into rules to be obeyed and maintained within its sphere,—the law-creating and the law-maintaining organ being the very state. Everything which is unavoidably necessary, presents itself upon the ground of this inevitable necessity as self-purposed, that is, as finding within its own being and existence the justification of its nature. Moreover, since the interests of man can only be secured by the adaptation of his activity to circumstances, he is bound to recognize as actual and absolute everything that has come into existence independently of him, and to take it into account as an element of his future conduct. In like manner the state is also marked by the character of rational necessity, and has thus its own inherent aim. As an embodiment of the condition regulated by law, the state is, therefore, the form in which every society may realize its central principle, that is, its vital interest, and it is thus the general, universal, and, as such, the unavoidable condition of every special social purpose. For this reason, Hegel might justly style it, the harmony and fulness of the moral will both subjective and objective; Krause, the fulfilment of human community; and Ahrens, the personified order of life which brings into view the internal aim of human community as its external vocation. Since, however, the state is never, in a concrete case, a mere law-creating and law-maintaining organism, nor ever presents itself only in its spiritual constituents, but is also at the same time the actual dominant society, having a concrete interest of its own, such absoluteness of the inherency of the aim in the proper nature of the state is merely formal. For, materially, the aim of the state is always relative,

that is, connected with the aim of that society which forms its body, and continually changes with the culture, the capacity for organization, and the social interest, with, in a word, each of the agencies of human civilization severally.

The state, owing to its being also the dominant society, embraces, moreover, at all times in its aim the aims of all the subordinate societies. As such, it comprises within it all the inferior societies, and, in establishing its own law, this must be effected in such a manner—unless indeed it eliminates its essential component elements, whereby it becomes impaired in its own sphere and lessens the possibility of satisfying its own principle—that its vital interests, expressed in rules of law, may also serve the purpose of satisfying the subordinate social interests. Thus, the aim of the state also unavoidably embraces within its frame the aims of the subordinate societies. This plenitude of its aim is, therefore, also always relative in point of fact; it can attain its full measure only in a state corresponding with the ideal society of the highest order, whilst, at a lower stage, it always extends merely to the sum of those aims, which present themselves at a certain period of human development as the vital interest of human communities at that time.

§ 148. Owing to this its twofold quality, according to which it is, on the one hand, absolute, and, on the other, connected with the aim of the society dominant for the time being, the aim of the state is thus inherent in the nature of the state, and also embraces the aims of the inferior societies. It may be conceived of either as being strictly formal, or as concrete and material, according as it is identified merely with a certain mode of operation of the state, or with a certain state of things to be brought about as its result. And, moreover, since the notion of the state can be defined either formally or materially, according as we look either at those of its attributes which spring from its function as a mere structure, or as we make an exhaustive description of the whole

sum of its spiritual and corporeal contents, the assent of the different authors to the formal or the material conception of the aim of the state depends upon which of these points of view they adopt when defining the notion of the state. Both, indeed, are appropriate, if those of its functions which correspond with its permanent and abstract nature are conceived as being absolute elements of its aim, and its relativity kept in view in characterizing the concrete aim corresponding with its full attributes. But if, in the first case, the actual aim of the state or its ideal is considered as exhausted by the formal definition, it necessarily remains empty and puny; whilst if the aim of the state is invested with material absoluteness, and is thus extended over all the possible aims of all the elements of the state, and described as embracing the whole sum of aims of the activity of individual members as well as of human communities, it inevitably leads to that internal contradiction, which lies in the particularization of single features of a perfect and complete ideal, whenever the conditions of its formation and being are unknown. Yet, whenever the formal conception of the aim of the state finds its expression in the task of creating and maintaining law, and law figures as the condition of external co-existence, or as the sum of those rules according to which, by a universal law, the activity of individuals living together can subsist, then the collective activity of the state is merely identified with its limiting sphere of action, and hence the aim of the state appears as the assertion of the smallest measure and degree of human co-existence.

But since the state is an inevitable form of every society, it must also answer the wants of the most complete human community, wants which, as humanity develops, are every day increasing. Hence, the aim of a state of the highest order, that is, the ideal aim of the state, must needs be suitable, not only to the rendering of the smallest degree of co-existence possible, but, necessarily also, to effecting the most perfect co-operation possible. On the other hand, if the aim of the state be regarded as identical

with any mass of state functions, or rather with their greatest possible sum total, and if the creation and maintenance of law were interpreted in such a manner, that men would thereby be not only prohibited from extending their activity beyond a certain measure and direction, but were compelled to intensify it—that is, that their activity would be supplemented by the state itself—and if the law were not defined simply as a limitation, as a rule directing conduct, but as the sum of the material conditions of co-existence and development, then, and in that case, the aim of the state, as is observed by Stahl, must not only consume the entire activity of the community, but the sum total of the individual activity of every single man as well. Nay, more, it even surpasses this, and seems to contain more than its elements really supply it with. The state, indeed, can render but a part of that force which it obtains from the co-operation of its citizens. Its whole power, when finally analyzed, springs only from the collective sum of the exertions of each one of its members in behalf of the state, nor can this be made fully available in the power of the state, seeing that a part of it is inevitably absorbed by the internal work of shaping the self-consciousness and will of the community. In the same way, the action of the simplest machinery, in directing and transforming the forces of labour, always results in some loss of power through friction. The highest degree of effectiveness of the state, enlisting to an equal extent the efforts of its citizens, furnishes the standard of the perfection of the state-organism, but it cannot be taken into consideration in determining the aim of the state.

§ 149. Historically, however, the theories concerning the aim of the state were never stated in this rigid form, which would reduce them to their final elements, but they were always linked with some other abstract notions. The formal theories were expounded as theories of self-preservation and of the creation and maintenance of law, whilst the material ones were conceived as theories of a religious, hierarchical, or pantheistic character, as relating to

moral order, to public weal, to the will of the people, and to utility.

The theory of self-preservation is, properly speaking, that of aimlessness, and arises from the fact that the state was conceived as either founded strictly on external force, or as having been produced by the capricious operation of natural forces.

The state was thus placed out of all relation with the interests and aims of its members, whose combined efforts are absorbed by the work of preserving the state, without redounding to their advantage. Accordingly, the power of the state has, according to this view, no surplus force left for social purposes. This doctrine may also appear in connection with a theological conception, as in the case where the temporal power is directly venerated as the embodiment of Divine power, and, in this instance, self-preservation, as the aim of the state, manifests itself in the recognition of the inherent nature of the aim of the state and in the denial of the plenitude of its aim.

The theory of self-preservation presents itself as the theory of aim peculiar to the patrimonial state, and in its simplest form it is always characteristic of those phases in the development of the state in which a dominant society of long standing and establishment feels itself threatened in its existence and position by a society founded on new principles and interests, and simply endeavours by despotic means to uphold and preserve the established society. It then does not recognize at all a wider sphere of interest, or one of a higher order than the actual one, where, in the dread of all progress and in the anxiety about the uncertain perils of the future, the evils of the actual condition are forgotten, or where, in the desperate clinging to the privileges of some ruler or of a ruling class, all other human interests are lost sight of. Self-preservation naturally forms also the aim of the most primitive communities, which have not yet arrived at self-consciousness; at which period, however, being necessarily devoid altogether of any theory, it does not assume a systematic form.

§ 150. Whilst, thus, the theory of the aim of self-preservation arises either from the negation of the interest supplying the society of the state with its principle, or from its meanest interpretation, the strict theory of the aim of maintaining law confines the state, in point of fact, to the part of acting as a mere index of the activity of the society. Starting from the supposition of the complete self-regulation of the social relations, of the indissoluble harmony subsisting from all eternity between the interests of the individual and of the community, of the perfection of the consciousness and will, in a word, from the supposition of the excellence of the moral attributes of its elements, the individual members of the society, this theory represents the state, not as an operative organism, but merely as an organ expressing the social order. The reason for this conception lies in that significance ascribed to law, according to which it is a purely abstract rational rule, a supposition which again originates in the idea that man is guided in his conduct exclusively by practical reason. Thus, the theory of the aim of maintaining law is entirely dissociated from the concrete social phenomena. Since, however, this kind of conception of the law is quite empty, it was replaced in its practical interpretation, unconciously and imperceptibly, by the notion, according to which law meant those limits of human activity which, as a matter of tradition, have passed into consciousness; being therefore conceived as unavoidably necessary, the idea of their general nature thus easily glided into the idea of their being of a completely abstract nature. This theory derives its popularity from the additional circumstance, that through it the idea of that state may be most easily formed where law reigns supreme, that is, where all its activity might move merely within the sphere of general laws previously defined and fixed. Every society tries to accomplish this during periods of protracted peace and secure rule, when the principle giving life to the society has passed into the consciousness of every one of its members, and shows itself in harmony with his private interest, thus

admitting of an especially easy identification with the ideal of the national state.

§ 151. The theory of the aim of maintaining law is, therefore, of metaphysical origin, for it results from a conception of law not of a practical but of a metaphysical character. The pantheistic, hierarchical, and religious theories of aim are also of a metaphysical nature, but they are the products of a rudèr stage of philosophy. Of these, the pantheistic theories spring from the fundamental idea, that the material and spiritual phenomena are parallel expressions of the order of the world, which may, as with Spinoza, be equivalents, or may, with regard to their essence, be merely the manifestation of the soul of the world, or of the universal mind, as the Stoics and Hegel hold. In both cases, however, consciousness and its agencies, together with its results, assert themselves secondarily and imperfectly only in the individual; they relate, in the first place, to the universal mind, of which every institution, all community, and every community is one phenomenal form and stage of development, and of which the state, too, is thus an embodiment, regarded at times as of a higher, or, at others, as of a lower order. Its aim is, accordingly, supplied merely by its own existence, and by those of its concrete endeavours, which are accounted for as in the order of the forces of nature; any further appreciation or criticism of this theory from such a point of view must therefore be banished from the province of science. It is obvious that these theories can also be connected with such as are founded on religious assumptions, inasmuch as the order of nature is regarded as connected with the Divine Being; in either case, however, the fundamental suppositions lie without the sphere of science, and thus their results are incommensurable with those of science.

§ 152. Yet, whenever the question of the aim of the state arises, not from the point of view of ideas resulting from a general religious sentiment of uncertain tenor, but from that of the doctrines of some positive religion, then its solution also assumes a form corresponding with these

doctrines. Thus, if the state presents itself as the immediate work of God, its aim, too, appears as positively and directly fixed by the Deity; figuring, in the case of Mohamedanism, as the aim of world-conquest and of the propagation of the Divine word by the sword; or, as we find it stated in St. Augustine, and the later patrimonial writers, as the aim of exalting the glory of God, either by the contrast afforded by its proper results, or by the achievement of the Divine purpose, or, again, as St. Thomas Aquinas and Dante have it, as the aim of establishing more or less perfectly earthly peace all over the world. If, however, the state be conceived as the medium of a higher organism, as the instrument of the Church, which itself, in its turn, is of immediate Divine origin, its aim is, as we also find it represented by St. Augustine, by St. Thomas Aquinas, and in the theory of the ecclesiastical law, a religious, and hence a hierarchical one, serving the purpose of promoting ecclesiastical interests and objects.

According to this view, therefore, the aim of the state is to prepare man, not for his existence on earth, but for life beyond, nor is it to be attained within the state itself, but beyond its sphere. The individual, too, is at the same time invested with an importance out of all proportion to that of the state, since, in comparison with life beyond, all that is of this world and of the state, becomes quite secondary and insignificant, and thus the ultimate weal of the individual is naturally placed above every interest of the state. Yet we find a distinction observed in the different theories relating to this matter; namely, that, whilst in some, as with the Protestants, the precise appreciation of the chief good of man is left to individual judgment, its determination and effectuation is, according to the tenets of the Roman Catholic Church, entrusted to the Church itself.

§ 153. The theory which contemplates the establishment and maintenance of moral order as the aim of the state is also akin to the ecclesiastical theory, but it is, at all

events, besides, of a metaphysical character. The notion of moral order is rather indefinite, and may be made to relate to various matters, in numerous aspects. It may be used as a substitute for the conceivable essence of the Deity, as is done by Leibnitz, Krause, and his followers; or for the harmonious and just interdependence of the agencies of the human soul, as used by Herbart and his followers. It may be also employed to characterize the condition answering the postulates of practical reason, as is done by some writers belonging to the school of Kant; and, finally, as tantamount to the public weal, understanding thereby, however, not only that condition which affords full material satisfaction, but also that of possible moral perfection, as in Wolf, with whom, therefore, the highest aim of the state is identified with the highest aim of its members, their greatest possible perfection. In this most pleasing form of the latter theory of aim, moreover, the state is regarded as fully supplementing every subordinate society and all direct individual activity. Thus, the theory of public weal, as a theory of perfectibility, deems the task of achieving moral perfection to be accomplishable strictly through the medium of the state. It is, however, obvious, that to effect this satisfactorily, the harmonious co-operation of the individual members as of the subordinate societies and of the state itself is essential, and that, if the two former agencies of progress are entirely lost sight of, this will necessarily lead to the transformation of the sphere of action of the state into omnipotence, a conception, which finds its corresponding embodiment in the idea of the enlightened despotism of the past century, and even in the communistic idea of the omnipotence of the state as advanced by Owen and Cabet. Indeed, even if the working of the state be not conceived as a substitute for the co-operation of the individuals and of the subordinate societies, thus rendering this co-operation superfluous, but merely as supplementing it, the marking out of perfectibility as the direct aim of the state, whilst the state itself is recognized as the judge of moral perfection,

must necessarily result in an unlimited extension of its power.

§ 154. The theory of public weal has, however, been subject to other interpretations also. In its most general acceptance, the proposition, that the state, like every other human institution, should subserve public weal, cannot be questioned, but it is devoid of all significance in this form, unless it has been likewise definitely determined, how far the state, as such, contributes to the promotion of the public weal, in what relation it stands in this respect to all the other institutions, and what constitutes, as to these, its proper and special office; and, further, in what manner the state can be directed to perform this its task. All other theories of aim may, accordingly, be ranged under the theory of public weal, beginning first with the theory of the mere maintenance of law, by which the state was, as with Thomasius, conceived to be an institution for securing outward peace; the theory of religion, if life in accordance with the disposition of God is imagined as being also most conducive to earthly happiness, as advanced by Paley and his school; down to the socialistic and communistic doctrines in which, as with Saint-Simon, Fourier, Cabet, and Blanc, and even with some later German writers, the province of the state is made incidentally to embrace, in addition to the organization of law, that also of labour. Two theories, however, arose within the sphere of this general and diluted view, which, circumscribing the aim of the state, endeavoured to extricate themselves from the indefiniteness of the notion of the public weal; the one, the theory of the will of the people, designating the modes of action to be followed and the organ to be employed, in order to achieve the public weal; the other, the utilitarian theory, reducing the notion of the public weal to elements capable of being accurately measured.

§ 155. The theory of the will of the people conceived the state as an institution by which the will of the people is to be realized, and also, at the same time, the interest of

the state as a whole asserted, since public opinion, properly ascertained, can only tend to the universal good of the community. The pivotal hypotheses upon which this doctrine hinges are as follows:—The members of society organized into a state are imbued with the consciousness of all those individual interests and aims, the attainment of which is beneficial to them; further, they know the aims, the assertion of which is desirable from the point of view of the community; and, finally, the means by which these aims can be accomplished: they have, in short, an intimate knowledge of the strength and organism of the state.

These three propositions, again, are founded upon additional assumptions:—the first of which is, that individual interests are not antagonistic, for, if they were, the endeavours to secure them would at once lead to collisions amongst men. The second, that individual interests are, in general, not at all, or at all events only to the slightest extent, opposed to public interest, for otherwise the citizens would be indifferent to the assertion of public interest, and every one would only take care of his own interest. The third assumption is, that the citizens have a perfect insight into the sphere of public interest, and are capable of weighing it as well as its consequences. The fourth, that the citizens are capable of public sentiment, and ready for such self-sacrifice as is requisite for the full realization of the public interest. The fifth, that in determining the public interest, the interest of the highest attainable order is selected. Lastly, that, since the aim of the state cannot be achieved by a single act, but requires permanently directed efforts to that effect, the will of the people should also remain permanent, changeless, and identical.

All these hypotheses are diametrically opposed to the whole experience of history, as also to the data furnished by psychology, for they are all founded on a belief in the full and ideal development of each individual man, as well as of the whole of mankind. Experience, indeed, justifies neither the assumption that men always recognize their proper, actual, and ultimate interests, nor that their views

are not antagonistic to each other, nor that they see the security of their aims so far identified with the public interest, as to unconditionally renounce them in its favour, nor that they always conceive the permanent and greatest advantage of the community to be identical with the public interest. And least of all do facts correspond with the supposition, that the views of the members of some given society might remain permanent and changeless, under all circumstances, even with regard to the most general direction of conduct. But, besides these circumstances adverse to this theory, it has to combat another great difficulty, namely, to determine which of the various views, all of them usurping the name and title of public opinion, really does correspond with the will of the people, and the assertion of which of them forms the proper and just aim of the state.

Rousseau, in this respect, attempted to furnish an answer by his doctrine of the public will, in which he insisted upon the complete abolition of all societies inferior to the state, and regarded as the real public will that resulting part of the various conceptions of interest which the citizens of the state, supposed to possess perfect self-consciousness and self-control, agreed upon after comparing their views concerning the same directly amongst themselves.

It is undeniable that this theory answers in an eminent degree that ideal of the national state, in which every force and ability of the citizens should be harmoniously developed to the utmost extent; and it must likewise be admitted that no *a priori* security can be afforded that any one member or several members of society who happen to possess the sovereign power would be better qualified to recognize the proper public interest than the whole sum of the members. Yet, the history of social development on the whole justifies the prominence obtained by monarchical and aristocratic elements, and shows their supremacy to have been indispensable during certain periods, owing to the fact that self-consciousness, readiness for the tasks of society and the ability to fulfil them are not evenly de-

veloped in every member of the dominant society. History, on the other hand, proves that every concrete social interest penetrates after long struggles into the society, and by degrees becomes reflected in the views of each one of its members. It is, therefore, inevitable and natural that, during periods marked by democratic tendencies, the aim of the state should become identical with the will of the people, yet always with regard to some concrete and positive task only, and not in an abstract and general sense. It must not, however, be forgotten that the theory of the will of the people derives its chief importance in connection with the question of the foundation of the rightfulness of the sovereign power, and with the political consideration, to what extent it may be desirable to leave to the totality of the members the determination of the direction to be given to state activity, so as to promote amongst them a greater readiness for sacrifice and a higher degree of exertion.

§ 156. The utilitarian theory, again, although its more precise determination was effected by Bentham from the practical point of view of legislation only, comes before us with the claim of an independent philosophical value, not only as determining the aim of the state, but also as supplying all the doctrines of morality and law with a fundamental principle. It places itself in antagonism to the ascetic view of the world, which, owing to transmundane considerations, does not seek to lessen the earthly sufferings and ills to which flesh is subject, nor takes into any account terrestrial advantage and happiness. It is, further, in conflict with the systems appealing to the emotions which only judge of the value of endeavours by the standard of sympathy or antipathy, are often founded upon metaphysical notions or casual association of ideas, and are incapable of being reduced to ultimate elements, and, hence, of being amenable to scientific explanation. Consequently, in estimating the value of aims and results, it mainly devotes its attention to their efficacy as means of satisfying human wants, or of removing the obstacles standing in the way of such satisfaction.

In order thoroughly to compass this its principle, the utilitarian theory starts from the general proposition, that the greatest amount of happiness for the greatest number can be alone accepted as the proper aim of any activity, and, consequently, also of the activity of the state, upon the ground of the assumption that, for the purposes of practical life, all men are to be looked upon as equal, there being no general standard applicable in determining the difference between man and man. The concrete application of the utilitarian theory presupposes, besides, the possession of a thorough insight into spiritual as well as material advantages and enjoyments, on the one hand, and into the hardships and ills, on the other, rendering possible the establishment of the true proportion between them, and allowing of a just comparison. But it is in this very respect that the theory is most obviously defective; since it is quite impossible to ascertain the amount and bearing of human pleasure and human pains in such a manner, as would hold good for all times and under all circumstances. In order to accomplish this, we must needs presuppose again an exhaustive and perfect knowledge of the physical organism as well as of the spiritual circumstances of man. Even then, granted that such a knowledge might be acquired, the question would still remain open, how and on what principle the account of the labour, pains, and sufferings of the present generation should be set off against any easier and more complete realization of the interests of posterity, eventually resulting from the former, and how the struggles with the hardships and wants of the past and present should be balanced against the happiness of the future. Thus, the strict utilitarian theory from its own standpoint presents two insoluble problems; first, that of proving the justice of the sacrifice of one individual for the benefit of a greater number of others, with regard to which proposition this theory can establish no limits; and, secondly, that of justifying the identity of interests of the whole of mankind, of the past, of the present, and of the future. This supposition might perhaps be accepted from

a religious point of view, and may incidentally find an approximate warrant in history, but is not at all adapted to serve as a philosophical foundation for a deductive theory.

These reasons led to the recasting of utilitarian theories into a new form, in which new premises are accepted, namely, that the development of human unselfishness and readiness for self-sacrifice progresses hand in hand with the degree of intensity of sociability and of life in the community, and has the effect of inducing men to surrender a certain part of their own advantages in the hope of securing a brighter future for others. Philosophically, this is undoubtedly a considerable improvement; but, with regard to the determination of the aim of the state, the theory is thus robbed of its apparent precision and simplicity, and its applicability is rendered dependent upon the ascertainment of the laws of organic historical development.

§ 157. The effect of the utilitarian theory ought also to be considered in connection with the question of the sphere of action of the state. Since every advantage is, when exhaustively analysed, reducible to some gratification of interest in individual man, as the natural and ultimate component element of the society, whilst the determination of this again belongs to the sphere of individual consciousness and sentiment, it becomes, in the utilitarian theory, unavoidably plain, that individual consciousness must, for the most part, be considered as paramount. For this reason every individual is, as a rule, the best judge of his own peculiar advantage, and liberty of action is, on this very account, best calculated, as a rule, to secure its attainment. Besides, every theory which does not rest upon ascetic, religious, or metaphysical foundations, or upon sympathy and antipathy, is bound to concur in assuming the quality of the sound inclinations and endeavours of human nature to be such as tends to their own satisfaction, and, in consequence, to recognize the benefit of liberty with reference to the sphere of the private interests of man; and this, too, for the additional reason, that every restraint of human liberty is in itself unpalatable

and painful. Hence, we find Bentham asserting the doctrine that the state, in being compelled to employ force in the cause of the liberty and interest of others, is only choosing the lesser of two evils. From this position arises the fundamental doctrine of the liberal school, that every interference or meddling, for the purpose of satisfying the interest of some other person, is an evil which must be confined to the narrowest possible limits, and hence, that the sphere of action of the state ought to be comprehended within the most circumscribed boundaries that are compatible with the security and order of the society.

With these inferences, however, the theory comes again into conflict with the opposing testimony of history. Although it is undeniable that discipline and self-restraint, having passed that stage at which they become conscious, develop through voluntary self-adaptation and practice, proceeding from individual initiative, yet it is no less certain that, at first, their growth is the result of continuous external coercion, and only later of the habits engendered thereby. A more generous conception of interest is itself only possible, where human consciousness has already attained a higher degree of development, and since such progress is, in every society, effected more rapidly with some classes than with others, it is proper, that the judgment and readiness of the subjected classes should be supplemented by the judgment and readiness of the ruling classes in proportion to their mental and moral superiority.

The recognition of this proposition has occasioned endeavours to define with precision the sphere of individual liberty, endeavours which, especially in Mill's work on liberty, embrace also the ascertainment of the importance of individual initiative with regard to all social development. Attempts are also often made to distinguish in this connection the mere regulative activity of the state from its material and operative functions, a tendency characteristic of the doctrines of Herbert Spencer, which, with reference to the aim of state, reconcile in fact the utilitarian theory with that of development.

The distinction thus drawn between the regulative and the operative functions of the state appears, at first glance, to be identical with the divergence of the theory of the aim of maintaining law from the theory of the material aim. There is, however, this essential difference. Whilst the theory of the maintenance of law, in all its rigour, conceives that the state is bound to assert some absolute sum of law, as operative at all times and periods, the theory which considers the regulative function of the state to be the special task of the latter, deems this regulative function necessarily relative to the operative activity of the individuals belonging to the society, an activity which itself is being continually modified in keeping with the changes in culture.

§ 158. The concrete influence of the theories relating to the aim and functions of the state does not, however, manifest itself principally in the effect produced by them upon single movements of the activity of the state. The reason is, that the subordinate circumstances attending these movements, and the accidental agencies of the external and internal life of the state are so intricate, that it is almost impossible to analyse them theoretically, and to strike a balance of all theoretical considerations connected with them. This concrete influence is seen rather in their bearing upon the general course of the life of the state, or, more precisely, upon philosophical reasoning concerning the same, which does not always tally with the actual endeavours of the state, and finds, for the most part, its expression in those state-ideals, in which the theories of aim are likewise embodied, but which also correspond with the fundamental interests of the various societies, the several periods of whose ascendancy are reflected in them.

The first of these artificial state-ideals, or rather the first group of such, are those which are particularly described in the three political dialogues of Plato, in the "Statesman," the "Republic," and the "Laws." The state is represented there as a gigantic counterpart of the individual, the aim of which is the establishment of the

moral good, the rightful, and of justice, that is, of harmony, since it is justice that insures the harmonious combination of the different faculties and component elements of the individual, as well as of the state. Whatever is good and rightful is the ultimately useful, and, hence, the aim of the state comprehends also the ensuring of the useful. But just as the individual can never by himself bring about the full harmony of his own faculties and virtues, so can neither the state assert surely and definitely the just and the good. The hope of transmundane justice, primeval and Divine, presents itself to supply this deficiency.

The ideal of the state is that, in which men of different natures obtain each their place, and participate in the affairs of the community, in proportion to their several abilities and virtues. Since, however, these different natures may come into collision with each other, a special element, embodying the authority of the state, is required to prevent such collisions. This element is found originally and most perfectly in the personal direction of the Godhead, or of the ideal king, the sage, in the stead of the Deity, and plays the same part in the guidance of the state which the pilot does in steering his ship. Yet, as it is hardly conceivable, in a concrete case, that the sage would be placed at the head of the state, or, if placed there, that he would wish to remain, and that the citizens would be either willing or able to yield him obedience, the government of the state must be entrusted to the wise, and its defence to the warriors, whose impartiality in matters of government should be ensured by their being kept aloof from all private interests, by their being entirely devoted and exclusively directed to the common interests of the state, partly through a course of education regulated in every particular, and partly through community in women and in property. Thus, the three elements of the state, the wise, the warriors, and the producers, embody the three virtues of wisdom, courage, and temperance, whilst their harmony, proceeding from the perfection of the order of the state, gives rise to the fourth virtue, that of justice.

Accordingly, the aim of the state, and that loftiest of all virtues, justice, become identified with the idea of harmony, connected with the vital interest of the communal state. Thus, in Plato, we find a construction of the ideal of the communal state, with special regard to such of its elements, as were traditionally derived from the ideas current in the antecedent tribal and consanguineous societies, which, at the same time, account for the predominance of the principle of authority connected with patriarchal sentiments on the one hand, and with Plato's strange predilection for community in women and property on the other.

§ 159. Aristotle also marks out the aim and ideal of the communal society, not, however, in its older stages, but on the eve of its transition into the conquering society. With him also, the final aim of the state consists in a virtuous life, which alone secures both on the one hand the happiness of the individual resulting from the exercise of his faculties, and, on the other, the advantage and weal of the commonwealth, the greatest fulness of community, and also the assertion of justice, which, taken by itself, is the standard of all virtues and the essential middle term, equidistant from every extreme. The difference between this conception and the Platonic views lies essentially in this, that the Aristotelian aim of state does not completely absorb the independence of the individual, nay, even requires the highest possible intensity of individual initiative and energy, and leads thus to the repudiation of community in women and property. The ideal of the state, must, according to this theory, be realized either under the leadership of a king, almost superhuman, by nature Divine, and raised entirely above the level of citizenship, or through a system of education, which, developing harmoniously the whole activity of the citizens, manifests itself in the ordering of the spheres of power, distributed according to the considerations of the experience of age and occupation, and suitable to be exercised by every citizen during the various stages of his development, according to the extent of his abilities and sentiments of community.

The state is, accordingly, no longer absolutely exclusive, as with Plato, but such as befits the awakening interest of the conquering society, a society that has for its object the accumulation of wealth for consumption, and apt to be extended over constantly widening spheres of humanity.

§ 160. The ideal of the conquering state, founded upon the interest of the society having for its object the accumulation of wealth for consumption, is recognized in its perfection in the literature of Rome. The poet that most faithfully expresses the national sentiment of Rome, enthusiastically proclaimed domination and universal peace to be the final aim of the state, and Cicero, in his books on the duties as well as in those on the laws, marks out as the aim of the state the securing of universal peace, the firm establishment of the sentiment of universal community, and the assertion of public utility embracing the advantage of the individuals. The corresponding ideal organism of the state is to be determined by the mixed combination of the rule of different social elements and classes, each privileged according to the import of their functions in the state, and to be found in that form of government, in which, according to Cicero's view, it was actually realized during the happiest period of the Roman Republic, which had just risen to be the conqueror of the world. It is characteristic, that the ideal of the society connected with the interest of accumulating wealth for consumption is thus itself also of a strictly worldly and positive nature.

§ 161. The primary ideal of the religious society, being, in contrast to the former, of a purely transmundane nature, its earthly realization could be effected only through universal and perfect community founded on love, an attempt towards which was temporarily made during the first period of the dwelling together of the apostles. Subsequently, however, the realization of the ideal, and the means of embodying it, were sought beyond the sphere of earth, and human capabilities and any worldly organism whatever were deemed incommensurable with the ideal.

Later, again, the Church tried to realize it in its own organism, confessedly imperfect until it could become completely triumphant, and was thus compelled to assert its objects through temporal organs and to come to terms with worldly circumstances.

Dante tried to construct the proper ideal of a state amidst the efforts to revive the conquering world-empire. According to him the aim of the true monarchy, the universal empire, is the expression of that perfect human consciousness, realizing also the Divine purpose, which cannot manifest itself in single individuals, but only in the whole of mankind, and cannot come to full utterance, except through assured universal peace; but at the same time, the construction of this ideal state presupposes the fullest variety of all subordinate autonomous spheres.

This ideal universal empire, even two centuries and a half later, found a new expression in Campanella's "*De Civitate Solis*," though with a partial return to the Platonic conceptions, and to the tendency to intensify community, culminating ultimately in community of property. It is permeated by a theologico-metaphysical optimism, which represents the one and individual world-empire as attainable, not by the subjugation of the nations, but by their fusion into a whole, and as the embodiment of a religion perfectly according with the teachings of reason, and absolutely expressive of its supremacy. A latent ideal of universal empire survived still longer in Germany. In 1667, Leibnitz, under the name of Cæsarius Fürstenerius, still argued, that the emperor of the Holy Roman Empire was the temporal head of Western Christendom, not indeed by right Divine, but by virtue of the traditional convictions of the nations, often actually proclaimed—and that he it was who was called upon to exercise a sort of jurisdiction over other princes, for the purpose of watching over the universal peace, and of promoting the most perfect development of mankind.

§ 162. Indeed, during the periods of the Renaissance and of the Reformation, all theories, as well as the actual

attempts to realize them, present complex variations and combinations belonging to different periods and ideals. This circumstance is in accordance with the phenomenon, that, with the termination of the moral and political rule of the Church, societies, professing the most divergent principles, and which until then had played a subordinate part, enter the arena of politics side by side, all equally contending for supremacy, until at last the national state is formed, and establishes its sway over all the rest.

In literature, the idea of national independence is first broached by Machiavelli, in connection with the strict theory of self-preservation, whilst in More's "Utopia" Platonic reminiscences and the claims of economical community again predominate, although stress is at the same time laid upon the necessity of national representation and upon the claims of individual development, to be promoted even in matters of religion by education. Somewhat later, Bodinus endeavours rather to keep up the Aristotelian tradition, although he declines to accept the ancient definitions of the aim of the state, deeming them unsatisfactory, and, whilst regarding contemplative life as the state of greatest happiness and virtue, discerns the aim of the state in that organized peace, which is the more perfect the higher the order of the form of government of the state. Grotius, in his turn, designates the rule of justice and its attainment, universal peace not only of the body, but of the soul, as being the aim of human communities in their mutual, as well as in their internal relations thus ensuring the satisfaction of the sociality of man. Spinoza, again, likewise deems that condition of the state to be ideal, in which men live together harmoniously and preserve unimpaired the rights corresponding to their natures, in such a manner that they also assert their activity to the greatest possible extent.

§ 163. Deviating from these complex theories, the aim of the state is, with Hobbes, simply and strictly the protection and perfect security of its members in every direc-

tion. This theory leads him to give prominence to the absoluteness and unlimitedness of the sovereign power, and at the same time also to its perfect independence, a feature peculiar to the systems of the modern national states of Europe. Harrington subsequently attempted, in his "Oceana," to build up upon this foundation an ideal free constitution in which evenly-balanced political powers were allotted in proportion to individual fortunes, and moderated by state institutions; whilst Locke, in his attempt to secure liberty, narrows the aim of the state, and defines it principally with reference to security of life and to protection of property.

Beginning with this period, we find that with Wolf and Rousseau the material conception of the aim of the state prevails, and its formal definition with Thomasius, Kant, and Humboldt. Both these tendencies are, however, influenced by the doctrine of natural human uprightness and justice, characteristic of the views of the eighteenth century, and which was maintained by the encyclopædists in all its consequences in almost every field. In the utilitarian theories of Bentham and of the two Mills, on the other hand, this doctrine, as the only acceptable principle of the practical rules of life, was particularly applied to the ordering of legislation, to the defining of the sphere of action of the state, and, in general, to moral judgment.

§ 164. The reaction against the political transformations connected with these theories caused that return to mediæval conceptions and ideals, which is observable in varying degrees in the theocratical tendency of the works of Bonald and De Maistre, as well as in the metaphysical character of the definitions of the historical school, which were to the effect, that the aim of the state is the assertion of the national spirit; in the reflections of Stahl mediating between these views; and, finally, in the dogmatic doctrines of Hegel, who perceives in the state the highest realization of the idea, the self-consciousness of the spirit of the universe, and the actual Deity.

The combining of religious ideas and aims with the

theory of the will of the people furnished, again, the basis of the socialistic doctrines of Saint Simon, according to which it is the aim of the state to take care, that the natural wants of each individual should be satisfied, and that to each ability should be assigned its appropriate work; and gave a fresh impulse to other communistic theories akin to the views of Owen and Saint Simon.

§ 165. The communistic and socialistic doctrines in their Utopian ideals assign as a rule such unlimited functions to the state in relation to the individual, that they cease to be compatible with the natural limits of the activity of any community of a wide scope. Hence, the final tendency of every such theory leads to the breaking up of states of larger dimensions into fragments, and even to their being ground down to mere communal organisms, or else tends to the dissolution of every larger community into a loose federation. The doctrines of Owen, of Fourier, and of the modern communards, furnish instances of this. But how perfectly primitive these ideals are in character becomes very soon obvious in this feature, that excluding as they do the possibility of individual freedom and initiative, they also preclude the possibility of affording any higher satisfaction, except by way of miracles, as is avowedly the case with Fourier. In Proudhon's anarchical theory, finally, the federation of communities, devoid of all characteristics of coercion, and formed only according to the measure of the capacity and willingness for not only political but economical combination of all its members, presents itself as affording full scope, yet absolutely no security whatever, to the liberty of individuals. This theory would replace the activity of the state by breaking up the social units of a higher order, by distributing the various functions amongst self-constituted associations, and transferring them to private civil circles as separate and distinct as possible, as also by uniting these circles amongst themselves by means of a federation of a private character. In this writer's opinion, moreover, state activity answers its historical vocation whenever it gives the

impulse to voluntary association and federation, for the purpose of realizing such objects as can only be accomplished by united efforts.

§ 166. The communistic theory, like every theory which is followed out to its ultimate consequences, thus gives rise to theories antagonistic to itself, by inviting criticism with regard to the limits of its notions and hypotheses. In a similar manner the utilitarian theory likewise leads, in its development, to a doctrine which refuses to credit the operation of the state with any positive usefulness, and discovers the general aim of the state, the free choice of which it does not admit, only in the protection it affords to individual development, and in the outward expression of the limits of self-consciousness, which is as yet imperfect in the single members. This results in assigning to the state, at every cultural stage, a different sphere of action, and brings before us as the ultimate ideal of social equilibrium the picture of a condition in which, without any coercion, the final development of individual inclinations, and abilities presents itself as harmonizing with the results of perfect public sentiment, and as a mutual understanding and co-operation, finally rendering the regulative as well as the operative interference of the state superfluous. From the point of view of this theory, as developed by Herbert Spencer, every aim of the state merely possesses a relative value, which can only be ascertained by comparing it with the concrete phase of historical development.

§ 167. And, indeed, whereas no state can ever exist in the abstract, but must needs contain concrete social matter, and whereas every state is the dominant form of some society in history, and every dominant society, governed by whatsoever interest, assumes the form of a state, the aim of the state can never present itself in the abstract and in entire generality, nor yet as a distinct formal aim, or as one strictly material. Every actual state has its distinct proper material aim as well as its distinct formal aim.

Its material aim is invariably the special vital interest

which is the central principle of that society which supplies the state with its materials ; and its formal aim always is to determine those conditions of social conduct, by which this vital principle may be asserted within the sphere of action of the members of that society, and to provide for their realization. Its full aim is, thus, to supplement with the consciousness of the society the lack of consciousness with regard to the interest of community observable in the individual members, and to compel the combination of the members, wherever the capacity or willingness for voluntarily effecting the same are wanting.

The consciousness and strength of the state necessarily appear as the sum total of the consciousness with reference to the interests of community entertained by its members, and of their forces available for the purposes of community. But this consciousness and these forces are never, in point of fact, evenly distributed amongst the citizens, nor do the citizens contribute to them in an equal degree. Hence, where these are defective, the state is bound to supply the want, and where some of the members of the society do not, of their own accord, contribute to them, the state must employ the forces obtained from the rest in order to compel their co-operation. Where a society is so perfect that every task of community equally interests and attracts every one, and where everybody, in proportion to his strength, recognizes his position and duties with regard to the community—a state of things which takes place the more readily in proportion as a society is more evenly developed—there the business of the state subsides to its lowest level, and consists merely in preventing a disturbance of the public peace. Where, however, a society is as yet ill assorted, where the harmony between individual and social interests has not yet passed into public consciousness, where no conviction as yet exists of the solidarity of the members of the society, and, finally, where greater differences of culture, class, and power prevail, and hence also a considerable inequality in the rights and duties is observable, there the task of the state is much more extensive.

For a state is bound to represent and to assert by force the views and the initiative of those individuals who embody a preponderating measure of the consciousness of community as against the rest of the citizens, and to unite and give direction to the forces of organization, incapable, by themselves and unaided, since the members are unable to effect this self-consciously by means of voluntary social combination. The aim of the state is, accordingly, relative; in the first place, with regard to the concrete interest of the society supplying its material, and, in the next, with regard to the consciousness and sentiments of community of the members, and also to their capacity for organization.

§ 168. Hence, the state can never assume a sphere of action either too wide or too narrow, without running the risk of undermining its strength and of breaking up its proper order. If, therefore, it undertakes a task too arduous, and taxes the strength of its citizens to a greater extent than is necessary for the attainment of its proper aim, that portion of activity which it superfluously exacts from its members, yields a much scantier return than if it had been left to subserve individual initiative, which can, after all, alone supply the motive cause of all social progress. It follows, accordingly, that if the state assumes the management of affairs which the citizens would have been able to carry on without its aid, the effect will be, that the citizens lose both the disposition and the readiness for independent initiative, that their individuality becomes stunted, and that thus, as the factors of progress dwindle away, the state itself becomes enfeebled, and decays. Nor, on the other hand, can a state maintain itself which demands too little from its citizens. For, in the latter case, it will be unable to dispose of the means of satisfying the just claims arising within the society, and to concentrate in its hands that reserve of power, which is the sole pledge for the assertion of the law and for the stability of order. Indeed, owing to the lack of discipline amongst the citizens, and to the impossibility of properly applying their surplus strength to individual purposes, the want of the

means of satisfying the interests of community, and the more frequently occurring frictions between individual spheres of action must in such a case lead to the breaking up of the social order.

The proper determination of the sphere of action of the state is, therefore, tantamount to the solution of the problem of maintaining a just balance between liberty and order, this problem of course presenting itself again as relative to the condition and advance of the social agencies. It is true, on the one hand, that the liberty of the citizens is greater, in proportion as the state claims less of their activity for itself and restrains it to a lesser extent; but, on the other, it is equally true that, if the state is unable to protect any of its members against the encroachments of others, liberty itself wanes, nay, the lack of security diminishes the opportunities for asserting it, and hence for enjoying its benefits. It follows, therefore, that assured order is a necessary condition of liberty. The order of a society depends, in its turn, upon the amount of strength with which the state is able to uphold it, and if its sources dry up, that is, if the ability of and readiness for combination, which practice alone invigorates, fails the citizens, then order itself becomes unstable and collapses, for the healthful current of life of the citizens is arrested and broken up.

§ 169. The ideal of a state suiting any given society is no less relative than its aim, and can be worked out only by a state whose means and structure are in perfect harmony with that sphere and measure of human co-operation, which corresponds with the degree of the society supplying its materials.

From this it follows, in the first place, that the tasks of the state decrease in proportion to the spread of culture. In proportion, for example, as a society strives for ever higher aims, and the convictions concerning these aims become more general, and, in becoming more general, strike deeper roots in men's social consciousness, their common sentiments and readiness for self-sacri-

fice developing in connection with these circumstances; and further, in proportion as men themselves grow more capable of determining the means and the modes and processes of organization by which they are enabled to attain these aims, the sum of all that the citizens themselves are able to accomplish will, necessarily, continually increase, whilst the sum of the tasks of the state will naturally diminish. And this is especially so, since, in proportion as any given society is of a higher order, more human aims will occupy a place within the wider frame of its interest as subordinate aims, capable, by voluntary efforts, of realization.

At the same time, however, it must be borne in mind that, parallel with heightened exertions, and with the development of human faculties, human wants, wishes, and interests also expand, and not always equally in each of the different strata of the society. This in itself adds to the business of the state; for the greater the divergence between the views, the sentiments, the abilities, and the degree of readiness of the members of the society, the wider becomes the sphere of the regulative functions of the state, and the more it is called upon to determine by concrete rules that, which is not recognized by everybody as absolutely necessary, but without which the assertion of the fundamental principle of the society would be impossible, and which has, therefore, to be enforced by the state.

But, besides, as mankind advances and human interests grow more intense and of a higher order, the sphere of the operative function, of the state also continually widens. Nor does it follow that, because individuals or social circles can dispense with the co-operation and with the supplementary help of the state with regard to any certain interest, that there will not arise instead in some other direction a new sphere of action, which was before unknown, or could not be disclosed. Numerous instances of this are presented by history as well as by daily life. The state to-day effects in some directions but a small portion of what it accom-

plished in the same field centuries ago. On the other hand, however, it attends also to many other duties, which, during preceding periods, were not accounted at all to be interests and tasks of community. Hence, as culture advances, the sphere of action of the state, whilst diminishing in one direction, makes fresh conquests in another, and its growth or decline, on the whole, altogether depends upon whether or not the individual capabilities develop in an equal degree with the wants, and whether these capabilities are equally distributed amongst the members of the state, whose conscious combination has become indispensable in order to secure the paramount interest. The ideal condition, which can only be realized in embracing the whole of the social interests within a state connected with the society of the highest imaginable order, cannot, accordingly, be embodied in the structure of any subordinate state. The perfect consciousness of the individuals, their fullest capacity for organization, and the absolute readiness and unselfishness of their devotion, without any exception as to any one of them, constitute the premises of the ideal condition of mankind; a condition which can, of course, never be realized in history. In such, there would indeed be no occasion for state-direction, for supplementary aid, for coercion, or for any action of the state; whilst the law itself would be merely expressive of the condition of final equilibrium thus obtained. In point of fact, however, as long as there remains room for human progress, and as long as new aims continually arise, and fresh fields of action which necessitate the creation of new institutions, the calling into life of new organisms, and the framing of new rules of law, open out, the consciousness, the will, and the activity of the state will be continually supplied with fresh tasks. The mere upholding of the existing condition of things can thus no longer serve as a sufficient justification of the action of the state. To meet the requirements of the age, state-action should exert itself in fostering such a degree of social feeling and action as can alone afford an opportunity

of turning to full advantage the increased power obtained by man over nature, and in continually adapting the will of the state, that is, the law, into accordance with the results thus achieved, whilst, parallel with this process of adaptation, the gradual and continuous assimilation of the order of the existing society with the new circumstances should be also effected.

PART III.

LAW AND RIGHT.

CHAPTER XII.

THE NOTIONS OF LAW AND RIGHT.

§ 170. (Law, which is the sum of the conditions of social co-existence with regard to the activity of the community and of the individual, in its concrete form presents itself as the will of the state, whether openly declared in a command, a license, or a prohibition, or tacitly recognized in custom. The will of the state, embodying the consciousness of community, must necessarily relate to the dominant social interest, that is, to the establishment and maintenance of the conditions of existence of the dominant society. In these conditions, the element depending upon human activity consists, on the one hand, in such a regulation of the activity of the subordinate societies, and of the individuals forming the component parts of the state, as is necessary for the accomplishment of the tasks of community; and, on the other, in the assurance that the activity of one member shall not encroach upon the limits of another's activity, so that both the individual interests and the social interest may be harmoniously asserted, and, accordingly, the social order maintained.)

But the will of the state manifests itself in various ways. It is not always perfectly conscious, and is often partly instinctive; nor can it be always discovered

as proceeding directly or ultimately from the state, or as belonging to it. Besides, since the spiritual agencies of the state never actually answer their ideal condition and the supreme power represents but imperfectly, and often very slightly, the full consciousness of community, the state, as a consequence, does not know thoroughly its own conditions of existence, nor is it able to direct its will to every one of their intentions, but, ignoring them in part, its will casually embraces other intentions also, not relating to the sphere of the interests of community, but to interests of a private character which have usurped the place of the former. Hence it is, that particular propositions of law often appear as antagonistic to each other, even in the periphery of one and the same society, and that, at different periods, the law differs in one and the same circle. Moreover, since in dominant societies of different principles, the paramount interests, as well as the phases of development, vary with this difference, and, as a consequence, their conditions of existence vary also, their rules of law must likewise necessarily differ. The question therefore arises: What is that, which is properly essential in the notion of law; what have all positive rules of law in common; what purpose should they answer; and what is the real meaning of law?

§ 171. A further source of doubt springs from the fact that, besides the objective signification of the term law, where it presents itself in its final analysis as a rule established by the will of the state, in most languages another meaning of a subjective character is also ascribed to it. This term is likewise applied to rights,—certain spheres of the rule of the will of the individual, which figure respectively as the liberty of asserting a claim, as a circumscribed sphere of action, and as the sum of certain assured expectations. Thus *Jus* in Latin, *Recht* in German, *Droit* in French, and *Jog* in Hungarian, apply both to law and to right. Nor can it be doubted that there does really subsist a logical connection between the subjective notion of right and the notion of law, its objective counterpart. On the one

hand, the claims of the state and its spheres of action, and thus its rights, necessarily coincide with its will and with the consciousness of its power directed to its tasks. On the other hand, the limits set by the state to the activity of its component elements not only prevent them from extending it at the expense of each other, but protect it against the encroachments of others. Hence, the field of objective law appears as divided into severally distinct spheres, within each of which some particular subordinate society or single individual may freely assert their power and their own activity, that is, their rights, under the protection of the state. Moreover, so far as the endeavours of any individual to secure his own private interest form a condition of the realization of the public interest, and a factor supplementing it, the particular individual may claim the defence of the state, and, as the case may be, its aid against any injurious proceedings of others. Thus, subjective right may be analyzed into a sum of assured expectations, the fulfilment of which depends upon him alone who possesses the right. Whilst, therefore, the notions of law and of right thus correspond with, and supplement, each other, and may be ranged alike under the general conception of the conditions of social co-existence, it is likewise undeniable that each of them has its own independent origin, nay, that they sometimes appear in history as even antagonistic, and that their full harmony can only be the result of their finally developing towards their ideals.

§ 172. The idea of right, as that of a claim capable of being satisfied, certainly arises from some consciousness of power in the individual, and of his ability with reference to the assertion of his interest. Its origin does not allow its being counted amongst that class of notions which refer to the relations between man and his fellow-men; it is an idea rising out of the struggle against the agencies of nature in which man is continually engaged and the efforts aimed at their subjection, efforts which, in their turn, inevitably lead to the attempt to subject

other individuals. The idea of law has, on the contrary, its foundation in the declaration of the will of a superior, which cannot be altered by a subject, that is, in the notion of a command. Man learns, in the course of experience, to know the limits of arbitrary conduct; and when this happens, the notions of right and law for the first time meet, and their fusion is influenced in a great measure by selfish feelings giving way in society to public sentiment, and to readiness for sacrifice. As long, however, as the individual entertains wishes and aspirations the satisfaction of which he deems necessary with regard to himself, and looks upon the obstacles in the way of their realization as merely artificial, so long the sense of right is apt to become antagonistic to the sphere of law, just as the notion of liberty seems to contrast with that of order. The adaptation of the two notions, so as to fully harmonize, could only ensue, if it were possible to satisfy every need in the society, without trenching upon the satisfaction of any other need, if the antagonism between private and public interests were to cease, and the ready renunciation for the sake of a brighter future invariably balanced the pain of sacrificing the present; in a word, if an order were established, in which every factor of liberty could find scope for development. But all these are only features of an ideal condition lying beyond the historical future. Practically, just as positive law is not homogeneous, nor is of the highest imaginable order, so positive rights, recognized by it and capable of being casually asserted with the aid of the state, do not entirely answer the postulates towards which the aspirations of the individuals and of the subordinate societies are tending. Thus, the efforts at the full assertion of human wants are more or less antagonistic to the restraint of the rules created by the will of the state.

§ 173. From this conflict of the ideas of right and law, and from their mutual encroachment upon their respective boundaries, may be derived the explanation of the notion of justice. Objectively, it is the conception of that

external condition, and, subjectively, of that psychical condition, in which both are reconciled.

From this association of ideas arises the relationship of the notions of justice and of law (which is connected with it) with equality, which latter idea may be found amongst the most ancient theoretical component elements of these notions.

Justice is thus the condition of social equilibrium, both with reference to the domain of the rule of the will of the persons, that is, with regard to the harmony of law and right, and with reference to the maintenance of the limits of action of the different persons, or, in other words, to the mutual accommodation to each other of the several and distinct existing rights. And since law, in regulating satisfactorily the spheres of right, produces the equilibrium of society by distributing the various fields of action in conformity with the abilities of individuals, and with their recognized and attainable wants,—that is, rewards merit and the sacrifices made on behalf of the state, and punishes offences,—justice, for this reason, when relating to the creation of the social equilibrium, is styled distributive, and is thus a dynamical principle. It is called, on the other hand, corrective, when it simply effects the maintenance of the equilibrium thus established, as a statical principle, in preserving unimpaired the spheres of right, in readjusting the gain of one to the detriment of another by restoring the former conditions of things, and in preventing the occurrence of a surplus or deficit of profit or loss arising from improper changes. Thus, a general notion of justice was formed, as that of the establishment of a just balance and relation, a notion common to both distributive and corrective justice. Law was defined as a rule answering justice, and was likewise conceived as expressive of the abstract relation and balance of men among each other.

The notion of justice is, accordingly, of quite as complex relationship, and contains quite as many equivocal elements, leading to a variety of meanings, as the notions of law

and right, and may even be the occasion of further misunderstandings, owing to its connection with truth, which signifies the agreement of knowledge with reality, and thus belongs to the order of logical notions. Nor is the connection of these ideas merely accidental, as is apparent from the twofold use made of the term "true." Appropriateness is the common thought connecting both, refering with regard to truth taken in the sense of verity, to the mental conception of its meaning, and, with regard to justice, to the practically desirable. Owing to this connection, justice, law, and right show in numerous languages a kinship with the idea of the straight, of the even, and of the direct, excluding, as it were, all deviation and circuitousness; the idea of the crooked being thus identified with things improper and bad.

§ 174. Since, however, positive law does not, as a rule, come up to the full idea of law embracing every notion associated with it, the concrete condition and disposition of the embodiment of such positive law is also called legality as contradistinguished from justice. Legality, again, gave rise to the notion of equity, which, therefore, is not opposed to that of ideal justice, but only to the notion of legality, or, as it is usually expressed, to that of the letter of the law. The meaning of equity can be best obtained if we apply the notion of distributive justice to that positive condition of law, which does not demand any final equilibrium, but only further approximate correction; especially if some component part of the society, enjoying certain advantages, recognizes, with regard to its own conduct, the applicability of some rule answering a principle identical with that, according to which, outside its own privileged position, every other sphere had been defined in the ordering of the society. Leibnitz, accordingly, identifies equity with the notion of human charity, whilst Thomasius considers *honestas*, honesty, as its equivalent. Equity, therefore, figures as an approach to the ideal, as arising from conviction, in opposition to the positively existing, and thus, as the expression of the clearer con-

ceptions of the present, in opposition to the views of the past embodied in the concrete law, and as a consideration of the moral element, in order to mitigate the severity of rigorous rules.

But since every rule is of a general character and the result of abstraction, equity presents itself also as carefully weighing in particular and special cases those concrete circumstances which, deviating from the ordinary and general circumstances, could not have been taken into account at the time the rule was framed, and thus appears opposed to the literal assertion of the positive or rigorous law, which ignores individual differences. Hence, equity may be not only a sentiment developed in the individual, or rather its realization, but it may likewise figure as a form of the influence of public conviction, and may be also conceived as a factor in the changes of the social condition.

§ 175. The notions of propriety and decency differ, in part, from justice, and in part from equity, for although they presuppose a disposition and conduct in keeping with the law, yet they exact also the taking into account of considerations of rules and feelings much more particular, and of a higher order than those already attained and recognized by the community, and which, consequently, are founded upon a fuller social sentiment. Thomasius deems propriety or decorum, for this reason, a principle of politics, or of the science concerning the proper transformation of society. These notions are, however, also susceptible of different meanings. Their origin may be traced to the observation of those matters of ceremony and observance, which are not claimed as unavoidably necessary, yet in which, nevertheless, such considerations find their utterance, as man entertains with regard to the respect due to the convictions, feelings, and individuality of others, and which are referable not to demands of strict legality, but to principles of unexceptionable conduct going beyond the former.

Besides these notions, those of indulgence, of facility, of charity, and of piety, appear also kindred to the group belonging to the conception of justice.

According to the just definitions of Grotius, indulgence is the willingness of one, who has the power to release another from some obligation with regard to a person, a thing, or an action, to remit such obligation, as far as this may be done without detriment to justice or to public utility; and facility is the readiness to renounce one's lawful claim against others, for the sake of peace or of humanity. Both these notions, accordingly, deviate from that of justice as well as from that of equity; they are not founded upon the principle of asserting uniformity, but upon that sentiment which, going beyond the effects of distributive justice, provides protection and succour for weakness, and not only allows full scope to the exertion of others, but supplements it by the surplus of its own strength, and lays no claim to enlist it for purposes of community. Charity advances even further in the same direction; and if practised under the influence of such considerations of humanity as pass beyond the limits of mere public interest, it relates to the relief of private wants which are outside and do not concern the social interest, and cannot be attended to sufficiently in any other way; whereas, if it appears in the garb of a religious character, and as the fruit of devoutness and of awe of the superhuman, it is styled piety.

§ 176. This whole series of conditions to be realized, of inclinations and of virtues, has, therefore, its foundation in the sense of the necessity of satisfying human wants, that self-same sense which had led to the formation and organization of the spheres of society, the conditions of which relating to and dependent upon human action, are comprised in the law. The notion of law is, however, always more comprehensive than its concrete embodiment, and is connected not only with the existence of a community, but also with the conditions of its development, and even with such of its conditions as have not

yet fully assumed this character in the public consciousness, and the bearings of which upon the development of the community are a mere matter of guess, or with conditions which have casually figured as such in the past, but are not necessary conditions. To the extent that these conditions are not observed either instinctively or consciously by the individual, they present themselves as commands of a superior power. It is necessary, therefore, to distinguish between the different kinds of commands, to elucidate the origin and character of those which predominate at various phases of social development, and to ascertain, which of them are of a permanent nature, and which of a fleeting character, and thus to gather from the mass of notions mixed up with the idea of law, its common and enduring features.

Commands may, according to the source whence they appear to emanate, and to the means required for their assertion, be distinguished, either into injunctions derived from the Deity, or into commands of reason looked upon as the postulates of the human understanding, or into social desires, accepted as rules of social intercourse between men, or into commands of the state as declared by positive law. All of these at first appear to the human mind and to human experience as isolated regulations, relating to particular individuals and special cases and actions, but gradually they are conceived as permanent and proper rules or laws, relating to everybody, or, at least, to large groups of men, intended to govern general conduct, and subject to no change, nor bound to place, time or persons. For this reason, as soon as scientific thought develops, and the conviction of the uniformity and immutability of the order of nature, as of the universality of the connection between cause and effect, gains ground, other rules of a different kind are also viewed as running parallel to the laws of nature, as of like import, and as sharing in their attributes. The order of nature is conceived as the Divine will, and the laws of nature are

identified with the manifestations of Divine intendment, and, later on, according to metaphysical views, the relations between the conceptions of the mind are assumed to run entirely parallel with those which are supposed necessarily to subsist between things in nature. Thus develops the law of reason and of nature, as the the idea of a sum of rules to be unconditionally asserted, and as coinciding, on the one hand, with the idea of the order established by Divine purpose itself, and, on the other, with that of a body of customs universally prevailing amongst men, of institutions of spontaneous growth to be met with everywhere, and even with the idea of instinct manifesting itself uniformly in man and in brute creatures alike. Hence arises the absolute ideal of law identified in every direction with other absolute ideals.

§ 177. In opposition to this onesided abstraction, however, which leads to the accentuation of the common characteristics of these ideas, and even to their assimilation, and which removes these ideas more and more from actual reality, and even places them into antagonism with the same, owing to this very necessity of avoiding such antagonism the divergence of these notions also begins to become apparent; in the first instance, upon the grounds of difference between the modes and means of sanction and assertion which assure the effect of the various commands in a different way. The obedience to Divine injunction is founded upon religious sentiment, resting, in the first instance, upon the dread of the punishing and avenging action of the Deity, and to this dread are subsequently added confidence in superhuman judgment and wisdom, and love of and attachment to the personification of final and absolute perfection. The unconditional sway of the commands of reason is justified by the internal logical force of ideas, by their being in harmony with general human sentiment, by the supposed possibility of avoiding contradictions by means of consistency of reasoning, and, finally, by the experience of the permanence of the order of nature, deemed to run quite parallel with the dialectical

operations of the mind, and to be even identical with them. The observation, again, of social customs, of the externals of mutual intercourse, and of ceremonials, is enforced by the approving or disapproving judgment of those with whom man comes into social contact; whilst the irresistible force of public power secures the common recognition of the rules of law of the state. Accordingly, since a more general authority, extending to the sphere of the other commands, too, is attributed to the order of nature and to the command of reason, and since the latter does not manifest itself as externally, concretely, and directly effective, but is taken into account in an indirect way, strictly with reference to theory, to philosophical and scientific conceptions, and to criticism,—the notions of religious regulations, of the rules of law, and of custom embracing ceremonial and propriety of conduct, divide and part company. Morality, however, detaching itself from the rest independently, as being of a more essential character, unites within itself all those qualities of the three kinds of laws above mentioned, which are conceived as rationally inevitable, and as important according to true conceptions of man. Morality thus becomes connected with conscience and with individual faith, and therefore figures as an ideal rule and standard purely internal, and identical in its nature with the nature of the ideal of law.

§ 178. The separation of the different spheres of these notions is, however, effected but gradually, and in such a manner that, whilst the province of each is recognized in part as peculiar to itself, there always remain elements common to all. Thus the rules of religion and those of law, although certain actions fall under respectively the one or the other, relate in common to certain other actions, in such a way, that state-coercion presents itself as a support and substitute of Divine coercion. In like manner certain groups of the Divine order and of ceremonial custom also coincide, and, on the other hand, Divine injunctions are conceived as bearing also upon human thought and purpose, whilst customs are, again,

regarded as external forms, which are only of account owing to their traditional character. Law and custom, again, assimilate in part, by each ascribing a legal effect only to acts strictly ceremonious. On the other hand, the principle begins to assert itself that "*plus valet id, quod agitur, quam quod dicitur,*" and the rules of law are founded rather upon the essence of the relations of activity, and not upon the accidental form in which they may present themselves, whilst custom appears as the expression of decency and social propriety. Custom, comprehending ceremonial regulations, formed under the influence of the everyday and continually recurring circumstances of social life, and being the sum of the agencies of social tradition most faithfully preserving its peculiarities, is the first to separate and become distinct, as such; and remains confined to some portion, or to some single class of the society, fostered by its sentiment and maintained by its opinion, even at a time when the frame of the society has already expanded, and has been in part remodelled. The religious rules are of a less exclusive character, but they are, nevertheless, closely connected with the original and central interest of the society with which they correspondingly developed. Hence, as the social principle and organism changes, and is replaced by another, and as their peculiar features are likewise in keeping only with those component elements within the novel society which still answer the former society, they cease to occupy a place amongst the general laws of the dominant society. The rules of law, again, obtain an independent province of action of their own, as soon as the sphere of ordered intercourse extends beyond the circle of those who originally belonged to the independent society, and thus demands the conscious interference of the state. Coercion by the public power is in this case confined merely to the assertion of the law, or of what is recognized as the will of the state, although not, in point of fact, springing from the law of the state, but incidentally from either of those other two sources, which were in general already conceived as being of a different nature, and the currents of which had by that time been diverted into other channels.

§ 179. Now, in every society of a higher order, which has passed the primitive stages, not only do the realized interests and the considerations of community, figuring as the principles of the society then actually dominant, or of the one preceding it, present themselves as the aim of endeavours, but such also as are of a more general nature, and relate to structures of community which are not, as yet, asserted, and which constitute factors of the ideals of the future.

The rules of conduct to be observed from the point of view of the latter, cannot be enforced by coercion; yet, as it is desirable to take them into account, they obtain a sanction similar in character to that, which maintains ceremonial regulations and proper social custom, only that, in proportion to their importance, incidentally this sanction may become still more effective. As soon as faith in direct Divine interference and in superhuman material action is shaken, all that is not ancient and special in religious notions and regulations owes its security to a sentiment of a similar character. The periphery of religions may, however, on the other hand, expand beyond the organism of the society, and thus obtain for its assertion a basis analogous in character to that possessed by the aforementioned interests of community of a higher order. Whilst then these various ideas of an entirely different origin, owing to their common mode of sanction, coalesce, the ideal good and that which, according to strict tradition, is the proper or the religious, constitute together the elements of moral regulations. Besides, another characteristic feature common to all these ideas comes into view in this, that every rule governing any such relation as has not obtained the sanction of power within the positive organism of the state, can be conceived as concerning individuals only. Thus the sway of the laws of morality is recognized as extending to those relations of the individuals, which do not directly touch the spheres of the concrete society, relating as they do either to societies of an inferior order, descended from dominion and not possessing an autonomous sphere of

action of their own, or to societies of a higher order than the dominant society of the state, embracing it may be general humanity, or to such as are founded upon universal religious ideas, and even extend beyond humanity itself.

Hence, morality would appear to be a rule of individual, and not of social, conduct; and, since the final element of individuality cannot be identified with external activity depending upon external circumstances, but lies in the purpose and in the spiritual movements of the resolve of will, to which no material coercion is directly applicable, the rules of morality become thus crystallized as belonging and leading to the ideal of the individual good, and of the perfection of the individual soul.

§ 180. Law, therefore, to fix the result of this analysis, remains the sum of those rules which embrace the actual conditions of existence of the society, recognized by the state, and which can be enforced by the state. They possess, therefore, moral characteristics, inasmuch as the actual society is itself one of the forms of human community already attained, and the condition of more effective community in the future; and, further, inasmuch as the relations within the state are, in their final analysis, individual, and the elements of the individual will must be counted amongst those of the state. They are of a logical character, inasmuch as they are express or conditional commands, proceeding from conscious conception, and are meant to be understood and observed. Finally, they are of a material character, inasmuch as they must be always enforceable. The possibility of its assertion by coercion constantly attends the notion of law, although the necessity of the application of force arises only when persons decline to shape their actions voluntarily in conformity to the purpose of the state, or when the conditions of the existence and of the development of the state are not realized through ready private combination. Hence, it is not the question of the applicability of coercion, but of the concrete necessity of employing it, which is naturally con-

nected with the question of the sphere of action of the state. The character and measure of compulsion to be used thus always depends upon those agencies, which find their expression in the particular idea of the authority of the state. Hence, coercion does not constitute a component element of law in such a manner as to be, under all circumstances, inseparable from it—for, indeed, in an ideal condition there would be no occasion at all to resort to it—but it constantly forms, as it were, the reserve and background of existing law, to which it should be possible at any time, and on any occasion, to appeal.

§ 181. The analysis of the sphere of the notion of law, however, remains still defective as long as its constant companion and relative twin notion, that of duty, is not elucidated.

Duty is susceptible of as many complex meanings as law; for in its various relations it corresponds with every kind of command to be followed, as an internal compulsion of conscience impelling conduct in conformity with law, and its neglect involves the actual application of the sanctions of the law. Accordingly, there may be distinguished religious duty, legal duty, and moral duty. All these kinds of duty, again, may be either positive and obligatory, in that they require actual conformation of conduct to the law; or negative, in that they tend to restrain from such actions as would be injurious to the sphere of activity and to the subjective rights of others. Every right, therefore, in the wider sense of this expression, answering the regulations of commands of any kind, and legally secured by the latter, corresponds with twofold duties, different in character.

It is the negative duty of every individual to respect the right of every other; the possessor of a right, again, is under the obligation of making use of his own right in consonance with its nature and principle, whenever that right itself is conceived as the means of attaining a necessary object.

This positive duty, again, which attends every right in

the hands of its owners, answers those regulations of objective law in its wider sense, that is, of the systems of religious, social, legal, and moral rules, which exact from the individual sacrifices and willing efforts for aims lying beyond his private interest—the individual, indeed, being invested with rights merely on the strength of this his duty of co-operation. Since, however, the readiness to fulfil a duty is an individual matter of intention, and cannot be judged by the success of its result, the notion of duty, even if it relates strictly to religious or legal regulations, has, in general, an essentially moral aspect. The presentation of the notion of duty in this form becomes important from the circumstance, that religious, legal, and moral legislation, for the most part, do not proceed from the conceptions of the same society, or of a single period; and that, consequently, the rules obtaining in those different fields are frequently contradictory, and give rise to a conflict of duties. When this happens, judgment, from the moral point of view appears as the paramount standard for the comparison of the different commands, and for ascertaining which of them, according to the prevailing convictions, should justly prevail over the rest. The moral idea, owing to the notion of morality referring always to the future as well as the present, is necessarily always more advanced, and, hence, of a higher order than the ideal of law,—whilst the latter, in turn, bears a moral character, when contrasted with positive law.

§ 182. Besides, whenever the authority, from which one or another class of commands is derived, is conceived as amenable to no analysis, and as not reducible to the agencies of human consciousness and human will, duty will come before us as absolute, rising above all proof drawn from experience, and, consequently, as transcendental and primary, and fully corresponding with the province of objective law; whilst subjective right will merely figure as a sphere of action necessary for the fulfilment of duty, and, therefore, as an emanation from the latter. Upon this ground, accordingly, law and right, with regard to the

person or principle embodying the supreme authority, can only be spoken of by way of analogy or metaphor; for law and right, assuredly, do not mean here conditions of social co-existence. Such is the case with systems of a theological or metaphysical character, which appeal to superhuman authority in the matter of the establishment of the order of society, and obedience to which is, therefore, a transcendental duty, and thus independent of any positive or possible order of state; nay, its conditions themselves depend, on the contrary, in this case, upon the nature of the authority accepted as the premise.

In the organism of the theocratical state, the obligatory force of law is thus derived from that of the religious regulations, giving rise to the principle that God should be rather obeyed than the human ruler, who, perchance, may enjoin things contrary to Divine order. Again, in Wolf and Kant, we find perfectibility and the assertion of the moral good represented as the highest postulate of will, transcending experience, and deduced from the nature of the human understanding, or from the essence of practical reason, and thus, as a categoric imperative; law and right appear with them therefore merely as an emanation from reason, possessing in themselves no practical matter, and as being only a supplementary element of a final and absolute ideal system.

This tendency asserts itself all the more universally in those systems which proceed from the notion of morality; for morality contains, to an overwhelming degree, such regulations as cannot as yet be enforced by the dominant society; and its propositions, therefore, naturally rely, to a much greater extent, upon bare theory, and upon subjective convictions as to the developments of the future, or upon traditional faith, than the propositions of law, which, from their nature, are constantly subjected to the test of practical justification. Hence, we find that, in all the theological systems—especially in those resting upon a metaphysical foundation—the division of law is made, not according to its proper topics, but according to the

nature of the duties; and the distinction between the province of law and of morality is drawn in the manner observable in Grotius and Leibnitz, with whom, noticeably, subjective right, that is, *faculty*, is conceived as corresponding with enforceable duty; and the moral claim, that is, *aptitude*, as having no relative duty to correspond with, and as containing, therefore, but the means of possibly fulfilling individual independent duty.

§ 183. Thus, the notions of law proceeding from conceptions of authority, having their foundation in theology and metaphysics, and, therefore, lying outside of experience, and being capable of being embodied in a final and absolute ideal intended for all times and circumstances, and being likewise absolute, are no notions of law properly speaking, but are general and to some extent metaphorical. Indeed, as to origin, they do not differ in kind from purely moral duties, but can be distinguished with reference to the limits of their effect only; since, in this case, all the different kinds of commands, moral, legal, or religious, are traced back to one common source, and are distinguished only according to the sphere of their application.

The injunctions of religion will, in this connection, comprehend rights and duties, either revealed, or discoverable in nature, or through reason, or which refer to the relation with the Deity demanded by practical reason. The laws of morality are those of internal freedom or activity, inasmuch as the moral law alone is taken as serving for its motive, without reference to its external effect. Objective law, again, is here but the sum of the laws of liberty, as far as it manifests itself externally; the latter system depends, accordingly, essentially upon the former, and is thus also moral in its foundation, and, consequently, not connected with any concrete society, nor capable of being distinguished from morality by any sharp dividing line with regard to its nature. Since, however, the theological conception can likewise be only of a metaphysical character, whenever it is severed from the basis of positive faith and of concrete revelation, and since the logical order and force of the

connection of metaphysical notions are, in their turn, always identified with the supposed order of nature and with the immutability of the laws of nature, the metaphysical conception leads to the establishment of absolute ideals and systems of natural religion, of natural morality, and of the law of nature—the latter presenting itself, in this connection, as being also a rule antecedent to the social condition.

The final result of the metaphysical systems and the systems of the law of nature is, consequently, always this, that law is directly referable to the individuals, and coincides with morality. Since the notion of individuality, out of connection with society, must be reduced to its final elements, which manifest themselves in the expression of a sensible rational being, and since it appears as entirely abstract, the hypothesis of the equality of the individuals follows from the very foundations of the metaphysical systems and of those of the law of nature. In theological systems individuals are, indeed, equal also in the sight of the Deity, except as far as they unequally partake of Divine grace, a factor entirely independent of themselves. They are equal, again, when viewed in the light of the idea of nature, inasmuch as, by virtue of their understanding, they all have an equal share in its spirit; and, finally, also, are equal from the point of view of the command of reason, inasmuch as all of them are presumed to be morally free. Accordingly, the notion of the equality of men forms in the metaphysical systems, and in those of the law of nature, a constituent and integral element of the notion of right—not, indeed, on any practical grounds, as with the utilitarian school, but as the result of the most advanced abstraction of the notion of man.

§ 184. If, and as far as we bear in mind, however, the human origin of authority, and thus also of the supreme power of the state, the commands of which constitute objective law; and look upon the state as a form of the dominant society, and as realizing its central principles, and accordingly upon the dominant society itself, in its

final analysis, as being the sphere of the coincidence of the individual interests with the superior vital interest, and of its realization through the co-operation of its members; it must follow that the claims and strength of the individuals furnish the basis to which the command asserting the social order must be always referred. The satisfaction of those constitutes the standard of the perfection of the society; and this is also conclusive with regard to the determination of the notions of right and law, which, as a consequence, are always relative to the system of human wants and to the mode of their satisfaction. Thus, the abstract and ideal notion of law presents itself as the perfectioning of positive law, and as constantly relative to it; whilst morality appears as the sum of those desirable rules, the realization of which cannot be expected, even under abstract conditions answering this ideal, through coercion on the part of the society.

Legal duty and subjective right—the latter distinguished from any claim not yet socially assured, which generally serves as a starting-point—figure, again, as derived from the objective rules, and as corresponding with them. Even religious regulations—if regarded from this point of view—show themselves as relative; for the idea of the Deity, though it be the loftiest, and though it form the absolute ideal of the age and sphere which gives it birth, changes with the advance of views and with the conditions ensuing upon the creation of ideals of a higher order. Consequently, the relation of man to the Deity, and the laws concerning his conduct arising therefrom, also undergo a change. Hence, in this train of thought, not only the subject matter, but the boundaries, too, of religion, morality, and law are continually changing in accordance with the modification of human consciousness and of the sphere of action of the state, in spite of the circumstance, that the specific difference of these notions is duly recognized together with their relativity.

Finally, those ideals, which are expressive of the perfection of theoretical abstraction, and of the highest aims

marked out, for the time being, for practical endeavours, are thus also conceived as relative and changing; and lay no claim to any authority extending over all times and circumstances, remaining always connected with the organism and spheres of the society which exercises rule—that is, always keeping the level of its factors.

§ 185. These different shades of meaning of law and right, in their diverging combinations and relations, as well as in the stages of the gradual clearing of the notion of proper secular law, become at the same time reflected, as a matter of course, in the various words employed for the purpose of expressing these notions; the most important of which are the technical terms used by the people of the two countries which have played the most conspicuous part in the development of law—namely, the Greeks and the Romans. According to the currents of thought with which they are associated, these divide into three groups: one, which ascribes the greatest importance to the religious element in the law, and which is expressed in Greek by the terms *θέμις* and *ἱερὰ καὶ ὅσια*, and in Latin by those of *fas* and *sacra;* a second, which is linked with the metaphysical and moral idea of justice, and to which *δίκη* and *δίκαιον*, in Greek, and *jus* and *justum*, in Latin, belong; and finally the third, in which the idea of humanly-established law predominates, and where the Greek *ψήφισμα* and *νόμος*, and the Latin *populiscitum*, *plebiscitum*, and *lex* are properly used; whilst in the Greek *δεσμὸς* and *κράτος*, the foundations of the obligatory force of the different regulations are distinguished; and the Latin *ratio*, again, preserves, in the compound expressions in which it is used, the complex shades of rational conceivableness and order, peculiar to the different kinds of command.

The word *θέμις*, with the entire group of its kindred terms, points to that phase of conception in which the phenomena of permanent order begin to be recognized in human life and society, but are still looked upon as merely of a mysterious and directly superhuman nature,

—now deified in themselves, and now again venerated as Divine attributes. Hence, we find *θέμις* figuring in Homer as the personification of order, as the leader of Divine revels, as the summoner of Divine assemblies, as the protector of human deliberations in council, as the guard over the gathering and dissolution of these councils, and, at the same time, as destiny and right custom. In Hesiod it figures as the sister of memory, as the spouse of Zeus, and as the mother of order, justice, and peace. In Pindar it is regarded as the protecting goddess, and as the fellow-judge of Zeus; and, subsequently, as Divine law itself, and as that which is generally right. In this connection the verbs *θεμιστεύειν* and *θεμίζειν*, in the meaning of "to govern" or "to judge," present themselves; further, the *θέμιτες* as the primary dispositions of the Divinity; and, again, the *θέμιστες* as the principles of justice divinely established and sifted out by the judge, and which are, at the same time, the propositions of divinely-derived law and order, established in part immediately by the gods themselves, and in part by divinely-inspired men, and reaching far beyond historical memory, or being the application of principles of such a nature to new circumstances. The concrete institutions, again, of a purely religious character, which are ranged under these rules of law are the *ἱερὰ καὶ ὅσια*, referring to acts concerning Divine worship, funeral ceremonies, sacrifices, and mourning, the sacredness of which stands above human dispositions, and which, like *θέμις* itself, have their foundation, not in *κράτος*, the authority of power, but in *δεσμὸς*, the bond of destiny.

With the exception of a slight difference in their shades of meaning, the Latin *fas* and *sacra* correspond with the same line of thought; *fas* is a more abstract notion than *θέμις*; it is never personified, and means all the rules of Divine law which relate to human activity and morality. The corresponding *sacra*, the religious and funeral ceremonials, are, on the other hand, referred to, in their application to civil life, by the word *sacramentum*. In other European languages there has scarcely survived any ex-

pression answering this phase of intellectual development, excepting perhaps the Anglo-Saxon word *ae*, meaning the ancient common law, and relating, as it seems, to the idea of eternity.

§ 186. In contrast to these currents of thought of a theological character, appear those which embrace the metaphysical relations of the notion of law, and are embodied in the Greek word δίκη, which, though preponderatingly moral in its sense, signifies, at the same time, a correspondence with positive law, and in the Latin word *jus*, which again corresponds rather with the notion of the order of the state, and in the derivations of both terms.

The derivation of the Greek δίκη is connected with the notions of directing, of pointing out; and the root expressive of these appears to be identical with that one in the Latin language which means "to say." Thus, with regard to its origin, δίκη would be analagous to *fas*, according to one of the derivations of the latter from the verb *fari*, "to speak," although differing from it in meaning. Subsequently, owing to the connection between the notions of law and equality, we find in Aristotle the δίκαιον reduced, by means of a false etymology, to a division into two halves. In general, δίκαιον signifies moral as well as legal justice, the latter being usually understood in its ideal conception. The Latin *jus*, on the other hand, means essentially permanent human law. Originally derived from a root expressing connection and appropriateness, it relates to things happening in the regular way. Hence, its meaning of validity, and thus may be explained the subsequent connection between *jus* and *ratum*. Subsequently, it entirely assimilated with the notion of the law of the state, and hence obtained that meaning which pointed out the place of the judiciary and the judicial proceedings in general. In its plural, *jura*, it means the interpreted propositions of the ancient common law, as contradistinguished from the new law established by legislation; whilst its use in the sense of right is likewise derived from the notion of appropriateness, and developed later on into the meaning

of power over others. The verb *jubere*, together with its form *jussum*, from which the word *jus* is sometimes erroneously derived, is undoubtedly not antecedent to it, but is itself a derivative from *jus*.

It is worthy of note that the Gothic word "iusiza," the root of which seems to correspond with that of *jus*, signifies the "better," and thus connects the notion of law and right with that of the morally good, a connection peculiar to the Latin *justus*, and occurring, remarkably enough, in all the modern European languages, in the English right, in the German *recht*, in the French *droit*, in the Italian *diritto*, and even in the Hungarian *jog*, and which has led to the identification of the notion of law with that of the right side, of the straight, and of the even, a reference to which we already meet with in Homer's "straight decrees."

§ 187. The Greek word *νόμος*, and the Latin *lex*, ever, from the very first, expressed strictly the command of the state founded upon human dispositions, although the former was employed at quite an early period in a borrowed sense, as signifying, for instance, with Homer, the rules of song, whilst it was used by Pindar, and subsequently also by Plato, as expressing the metaphysical notion of the laws of nature. *Νόμος*, being derived from a root which originally signifies "distribution," is associated with a large group of words, embracing the notions of pasture, of shepherd, of fate, of number, of money, and ascending to the notions of country, of government, of disposition, of rule, and of law. In this latter sense, however, *νόμος* means the rational, general regulations which maintain the life of the state, in opposition to the *ψήφισμα*, the resolve of the people bearing upon some particular act. These two words stand in much the same relation to each other as the Roman *lex* to the *populiscitum* or *plebiscitum*, which latter involves only the consideration of validity derived from the will of the people. But *νόμος* and *lex*, being also founded upon internal causal necessity—the *suprema lex* not being the *voluntas*, but the *salus publica*, not subjective, but objective—can be created only by

men possessed of special qualifications for that purpose, after due deliberation, and obtain their final authority solely through the power or right of the assembly to give their assent to them—that is, through the κράτος. The Anglo-Saxon words "*laga*" and "*assetnissa*" imply also a sense of artificial construction, being derived from roots which signify "laying down," to which the origin of *lex* is traced by some; whilst the Hungarian "*törvény*" may also be traced to a root significative of "making artificially."

§ 188. We find, nevertheless, in quite the remotest periods of literature, the notions answering to the secular law, as distinguished from the Divine law, made the objects of personification—that is, deification, and drawn into relations with metaphysics. Thus Δίκη figures in Homer and Hesiod as a goddess, although the attribute of regularity belonging to law was solely identified with the Divine Θέμις. Indeed, according to the earliest definition of νόμος in Pindar's celebrated verse, "Law is the king of all; with lofty hand it rules over mortals and immortal beings, justifying even the most violent," this notion partakes also of the meaning of the law of nature, with the same primitive, metaphysical generalization observable in the Sanskrit *rita*, in the sense of the material, and, again, of the spiritual order of the world. This generalization is also reflected in the Roman *ratio*, especially in its compound expression *ratio naturalis*, which almost entirely corresponds with the definition of the *jus naturale* given subsequently by Ulpian, following in the footsteps of the Stoics, to the effect that it is the order of nature, as well as that natural disposition inherent in man, which gives rise to the institutions of marriage, of the bringing up of children, and also to those of property, of circulation, of trade and exchange, and to those through which power is asserted. The notion of *ratio* still further develops into the *ratio aequitatis*, and into the *ratio utilitatis* relating to the *jus singulare*, the former being the order of equity, and, at the same time, the earliest international order, and the latter, the exceptional order of utility. It passes, in addition, into the *ratio*

civilis, comprehending the consequences of the positive order of the state appearing in the law, in which connection, however, *ratio* has become identified with the meaning of human understanding or of general consistency.

§ 189. After the development of the philosophical schools, we find Greek writers giving increased prominence to the definition of the notion of law in connection with its moral bearings, whilst the νόμος having, since Herodotus, passed from the notion of the institutions of the state to that of custom, was used in its proper and precise sense during the latter phases of Athenian life only; νόμος being applied by the philosophers partly to mean the sum of custom, and, partly, to distinguish the written law from the unwritten law, in which latter capacity it was identified with the Divine law and with the law of nature. Pythagoras, accordingly, defined law, taken as synonymous with justice, to be that quality which, in his mystical system of numbers, became identified with the number eight, or the evenly even number, which orders the return of the same quantity and quality to one being, on the part of another being, which the latter received from the former.

Law—that is, justice—is, with Plato, the principle which orders the just relation between the activity of the three spiritual component elements of the two organisms subjected to it, namely, of the individual and of the state. With Aristotle it is that virtue which, in weighing the advantages to be distributed by the state or manifesting themselves in the circumstances of circulation, determines the middle between the much and the little, and is itself the essential medial; whilst, from Socrates onward, the law is throughout conceived as the enactment, in part, of the state, and, in part, of nature. In the proposition of Demosthenes, cited by Marcian, this definition was afterwards amplified with legal acumen, taking also into account the historical considerations, as follows: "The law is that which every man must obey for many reasons, but mostly for this, that every law is the invention and gift of the gods" (here Demosthenes touches

the relation of law to the venerable and ancient Themis), "the doctrine of wise men" (referring here to that phase of the development of the law when the law was looked upon, as in Solon's *θέσμοι*, as a matter to be determined only by inspired men), "the coercion of those who either intentionally or involuntarily offend" (reminding of the interpretation of the law by the tribunals for blood guilt), "the common institution of the state according to the determination of which every man who lives in the state must order his life;" thus including, in the closing sentence of the definition, the later element of the decrees of popular assemblies into the notion of law.

The Stoics, again, lay greater stress upon the metaphysical notion of law, which is by them identified with the law of nature and with the universal consciousness, λόγος, of the spirit giving life to nature—that is, of the Deity; and derive hence the three commandments of the law: "to live honestly, not to injure another, and to give every one his own," with reference to which it may be observed, that the notion of honesty is here not to be taken in the sense of simple propriety, but in a technical sense, meaning conduct in harmony with the just and eternal law. In defining the notions of justice, right, and law—not including the determinations of positive constitutional law, which naturally depend upon the sources of law of each separate period—the Roman writers and jurisprudents follow strictly in the footsteps of the Greek definitions. Thus, with Cicero, law is the just discernment of the supreme Deity, which commands honest actions and forbids contrary ones. With Celsus it is the art of the good and of equity; whilst Papinianus repeats Demosthenes' definition of the law with this characteristic difference, that, with a view to the course of development of the Roman law, he substitutes for "the doctrine of wise men" the "*virorum prudentum consultum.*"

§ 190. It is quite natural that the Christian writers, again, should refer the law to the Divine will, a tendency which we find for the first time reflected in the expression *lex aeterna* occurring in St. Augustine, as also in the con-

ception of law as the order answering the *lex ac*. This latter conception, owing to the preponderance of tomary law during the barbarous ages, is subseque. supplemented by the notion of human law founded u custom, as instanced by the citations in Gratian's collections, which draw a distinction between, on the one hand, the law of nature and the Divine law contained in the law of Moses and in the Gospels, and, on the other hand, human laws founded upon human customs. St. Thomas Aquinas, going further, distinguishes the eternal law, which is the governing insight into the whole universe existing in the Divine mind, and the law of nature, which is primary and secondary, and, in its first relationship, also Divine—for, according to the Apostle St. Paul, it is participation in the eternal law—from the human law which is established by men, in accordance with the times and their needs, out of the rules of the law of nature. With Dante, who starts from these premises, we find law and right defined as the personal and real proportion between man and man, which, if maintained, maintains society, and, if corrupted, corrupts it. Dante, accordingly, appears as the first writer after Aristotle, whose notions of law and right embrace also the notion of relation.

The writers of the era of the Reformation still share this theological and scholastic view of law and right. It may be met with in Suarez, Bolognetus, Melanchthon, as well as in other early Protestant jurists of Germany, as also in Selden, and appears, with some reminiscences of Platonic expressions, in its most pleasing form in Hooker's celebrated definition of law, to the effect, that: "Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power; both angels and men and creatures of what condition soever, though each in a different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy;" and, further, "Law is

that which men by discourse of natural reason have rightly found out themselves to be all forever bound unto in their own actions."

§ 191. In Grotius main stress is laid, again, on the definition of the law and likewise of the just. The first definition of law is negative, and as follows: "Law means nothing else but what is just, and that rather in a negative than in an affirmative sense, namely, what is not unjust; unjust, again, is all that which is opposed to the nature of society, according to the views of those who live within it," and, as a consequence: "The law is the rule of moral actions which obliges to do what is right." He further classifies the law into natural law and voluntary law, and defines the law of nature as "the command of right reason, which deduces from the compatibility or incompatibility of some action with the nature of society and of understanding, whether it contain moral depravity or moral necessity." Right, again, is with him the faculty of action, exclusively from the point of view of society. This latter definition is also accepted by Leibnitz, according to whom subjective right is a moral power. Thomasius, on the other hand, proceeding from Hobbes's definition of the law, says: "Subjective right is a moral faculty of action, which accrues to us through the permission of a superior individual, as against another with whom we live in society, with regard to something, to properly possess or act it." For Hobbes had returned to the proper and positive conception of law. Concerning the law of nature, he observes that, "a law of nature is a precept or general rule found out by reason, by which a man is forbidden to do that which is destructive of his life, . . . and to omit that by which he thinketh it may be best preserved. . . . These dictates of reason men used to call by the name of laws, but improperly; for they are the conclusions or theorems concerning what conduces to the conservation and defence of themselves," whereas, "Civil law is to every subject those rules which the commonwealth has commanded him by word, writing or any other sufficient sign of the will to

make use of for the distinction of right and wrong; that is to say, of what is contrary, and what is not contrary to the rule."

A contrast to this sober and positive conception is Montesquieu's definition of the law. According to it, "the laws, in the widest sense, are the necessary relations springing from the nature of things, and in this sense the Deity, the material world, the superhuman intelligent beings, the brute creatures, and men, have all their laws." In another place he says: "The laws of nature are so called, because they spring solely from the constitution of the human being." From these laws, again, may be distinguished the positive laws, those of nations, the political and civil laws. With Wolf the law also is metaphysical, but it is at least conceived in a consistent sense, viz., as the necessary means of fulfilling the duty of attaining perfection.

§ 192. A new era in the definition of law begins with Kant, who derives the law from the essence of practical reason, forming the principle of free will. Hence, objective law presents itself, according to Kant, as "the aggregate of those conditions under which the arbitrariness of one can be reconciled with the arbitrariness of another, in accordance with the general law of liberty," and subjective right as "the authority to use force."

These notions furnish the basis for all the subsequent German definitions of law and right. Thus, with Savigny, "objective law is the rule establishing the invisible boundaries within which the existence and efforts of every particular individual obtain a secure and free field." With Hegel alone a slight deviation is observable. He identifies objective law with will, absolutely existing in itself and for itself. Krause, again, modifies Kant's notion in conformity with the principle of the material determination of the task of the state, by calling objective law the organic whole of the external conditions of rational life. This is amplified by Ahrens, who conceives law to be the order defined by liberty, relating to the moral life of man as well of human society,

"which is the counterpart of the order of nature, acknowledging the mastery of causal necessity in such a manner that, both in the original and in the counterpart, the general Divine order of the world and of life, each in their peculiar character, is manifesting itself, and that thus law is a principle of order, producing harmony, which is, in a subordinate view, also a notion of power and government." Trendelenburg, following the same line of thought, defines law "as the sum of those general limitations of action in the moral whole, which have the effect, that the moral whole and its organism can maintain itself and go on developing."

§ 193. In opposition to this conception of the German writers, which constantly tends to the construction of an ideal notion of law, intended to comprehend within it both the connection between objective law and subjective right and its explanation, the English jurists have ever since Bentham drawn a sharp line of distinction between the two. According to this distinction, right is subjective, and, hence, an individual claim capable of being asserted through the public opinion in the state or in society, or by means of the aid and protection of the state. Law, again, is defined as a rule asserted by superior authority, which, according to its sanction, is either Divine, natural, moral, or consonant to public opinion, or law of the state. In its most abstract definition, law is thus described as a rule of conduct, valid with regard to a larger group of mankind, which finds its sanction in human disapproval, and which, in its relation to the state, is directly or indirectly asserted by the supreme power of the state, or as the sum of the rules ordering the structure and activity of the state—the final sanction in either case being the disapproval of the preponderating majority of the members of the state in question.

Latterly, however, a tendency is observable in German literature to come nearer in their definitions to this notion of law, deduced from the analysis of the nature of the positive rules, owing to the circumstance, that, under the influence of the doctrines of the historical school and of

Hegel, the conception of law as the assertion and limitation of will has more and more gained ground. Thus, Ihering argues, that the idea of law, as effecting the reconcilement between the notions of objective rules and subjective claims, can only arise from the conception of law as being obligatory in a double aspect. Law, therefore, according to him, is "in the full sense of the word, the bilaterally obligatory force of the statutes, that is, of the sum of the actual rules, or rather the subordination of the authority of the state to regulations emanating from itself."

CHAPTER XIII.

THE FUNDAMENTAL PRINCIPLE OF LAW AND RIGHT, AND THE PSYCHOLOGICAL DEVELOPMENT OF THE NOTION OF RIGHT.

§ 194. THE various definitions of the notions of law and right are necessarily onesided, and can never fully cover their entire matter, in that they involve the conception of the nature and quality of the social authority, the setting forth of the aim and sphere of function of the state, the determination of the fundamental principle of the society, and its definition as absolute or relative, and in that their appropriateness depends, besides, upon the measure of abstraction and of dialectical discrimination employed in framing them. Since, however, these different conditions of the proper definition cannot be all of them found in harmony, either in any single system, or even with any single thinker, the current definitions diverge from each other in many particulars, both with regard to their foundation and to the sphere of their contents. They refer, in turn, to the ideal law, to the positive law, at times not even to law and right in general, but merely to statutory enactments, and, in some cases again, to subjective right alone. As a consequence, they neither rise at all times to the level already attained by the notion of law and right, nor do they embrace all its bearings; the essence of the various trains of thought, in this respect, finding a much fuller expression in that marking out of the fundamental principle of law and right, after which the devisers of systems have always striven, in order to justify their convictions by pointing out concisely and precisely the grounds upon which they rest.

The fundamental principle of law and right is the most general and the most abstract summary of those attributes by which they become cognizable, the absence of which results in a condition of lawlessness. In systems in which law and right are conceived as being absolutely, immutably, and eternally identical, as is the case with the theological and metaphysical theories, these attributes form logically the internal nature and true essence of law and right. The fundamental principle figures as fully expressing it, and, hence, as the logical and most general principle of its cognition, *principium cognoscendi*, in the sense that it is that proposition which serves to distinguish it from all that is foreign to its true contents, and also that idea possessing actuality, from which, without taking into account any other agency, all those several rules and claims are by way of deduction derivable which may exact consideration as law and right, and their being comprehended in which is, further, the cause of their truth. It serves, besides, as the fundamental and effective cause of the actual existence of these secondary rules and claims, deduced in detail, *principium existentiæ*, or *fiendi*, as well as of their validity, *principium possibilitatis*, or *essendi*, from the superior, independent and absolute existence and validity of which they can alone derive justification and proof of their own existence and validity.

In theories founded upon experience, and avowedly relative, on the other hand, the fundamental principle is a mere standard, obtained exclusively by way of induction as the highest abstraction; serving the purpose of a paramount idea in the establishment of the logical connection and harmony of some ideal system, and, hence, of the most universal common notion to be found in every concrete and imaginable institution of law, containing necessarily the most formal, the most abstract, and the least positively material elements. Whilst, therefore, the import of the fundamental principle is, in the theological and metaphysical systems, also of influence with regard to the justness of their contents and of all their particulars, in the case of

the relative view, it is only conclusive as to the proper determination and organism of the frame of the respective theory, and its significance mostly consists in this, that it points out the grounds of the divergence of the different conceptions, and may be used to symbolize the connection subsisting between the notions of law and right, the source of the authority of the state, and the aim of the state.

§ 195. Hence, the historical sequence of the fundamental principles of law and right—since, at any rate, it fully presents to view those agencies and conditions which are decisive with regard to the formation of the notions of law and right—is connected with the development of the psychological idea of right, as far as this idea was formed consciously by means of theory; the fundamental principles reflect all the elements of the development of the notion of right, except such elements as have exerted a gradual and imperceptible influence, and produced instinctive formations. In this way, indeed, fundamental principles, apparently identical, may repeatedly rise to view during different phases of the development of thought; yet with some shades of divergency. These latter are due to the successive accession of such elements as do not owe their assertion directly to individual reasoning. Wherefore, from the point of view of solving the more complicated problem of concrete psychological development, it is desirable to first systematically classify, survey, compare and weigh all the possible fundamental principles of law and right.

The first question, however, which comes up in this connection, is, as to whether it be in any way possible to establish some fundamental principle, or to ascertain a general standard of law and right, or, according to metaphysical conceptions, a universally fundamental abstract cause of law and right.

The dispute concerning the existence of a fundamental principle of law and right, which, properly speaking, refers to its conceivableness—for the existence of a notion is always a matter of the possibility of conceiving it—has

besides been frequently identified with the question of the existence and validity of the law of nature, or of the law of reason, and, even with that of their connection with positive law, and was, in addition, mixed up with numerous extraneous elements; for instance, with the questions of the historical reality of the condition of nature, of original ideas, or of the standard and proofs of Divine revelation, which lie absolutely beyond the sphere of scientific thought.

§ 196. The denial of the possibility of a fundamental principle of law and right can only have its origin in the conception, that there exists no stable and general feature at all in human rules and in institutions of community, and that every positive system of law and right entirely differs from every other positive system of law and right, with regard to its foundation as well as to its contents and force. This view, again, can arise only from regarding men as altogether differing in nature from each other, and, consequently, from the wants, claims, and ideas in different spheres, at different ages, and under different circumstances, being robbed of all their contents of identical elements, and from the tendencies of human development being asserted to be merely accidental, and utterly diverging from each other. This would amount to a denial of the unity of the order of nature, of the stableness of human nature, of the continuity of social development, and of its organic nature and consistent course as well, and to a denial of the possibility of any moral sense, which, in this form, is merely a false charge made by some dogmatic writers against their opponents. This charge, if brought in good faith, may be ascribed to the circumstance alone, that an author who is convinced of the absolute truth of his own principle and ideal is generally unable to comprehend the possibility of a differing view, and takes consequently no account of its diverging foundation and tendency, nay, looks upon the rejection of his own view as tantamount to a denial of all rationalness. No doubt, however, that the rudeness and the variety of the offshoots of the early phases of philosophical thought have afforded some ground, not indeed for

the pretence that any systems denying the possibility of a fundamental principle of law and right had actually been established, but for the view that, individual reasoning being accepted as the exclusive standard of the validity of thought, the notion of the order of nature is apt to be placed into antagonism with the operations of the human mind, and with what are conceived to be its artificial, and accidental products. It must, therefore, be understood in this sense, when Archelaus pronounces law to be, like language, not natural, but merely positive; when Democritus points out that the rules of law are artificial, whilst atoms and the vacuum have an existence of their own by nature; when the Sophists, who deemed truth to be merely subjective, and regarded the individual as the ultimate measure, declare right to be merely positive, as a calculation of personal advantage, as the regulation of the over-strong, or as the artificial defence of the weak; when the Cyrenæans and the sceptics rejected nature as the foundation of right; and, finally, when Carneades looked upon individual advantage and instinct, depending upon every one's own judgment and passion, as the only possible rule of action.

§ 197. It can be easily understood, however, that those who, proceeding from metaphysical grounds, perceive in the fundamental principle of law and right the effective causes of the validity of the positive rules of law, and, accordingly, assert not only the possibility of constructing ideal systems of the law of reason, and of the law of nature, but also of their universal concrete realization, should see a denial of the existence of a fundamental principle there, where it merely figures as a possibility of being abstracted from concrete institutions, and as expressive of their common attributes. Yet, whenever the philosophy of law and of state is placed upon a strictly scientific basis, and does not step forward with the claim of an absolute and final ideal holding good for all times, it must necessarily attribute but a relative validity to its propositions, and, above all, to that general summary of them, the contents

and meaning of which unavoidably change with that sphere of phenomena, in which it is used to give expression to identical relations. On the other hand, the systems of a theological and metaphysical character, such as the systems of Divine law, of the law of reason, and of the law of nature, claim for themselves, quite as naturally, absolute, eternal, and universal recognition. From their own point of view, they are unchangeable from their very nature, and equally valid at all times and in all places, and thus they attribute to themselves an existence and authority distinct and independent from their external manifestations or acceptance, according to which positive law is of binding force only to the extent of its agreeing with their doctrines.

That the creation of every ideal is, at the same time, an expression of the endeavours to realize the same, follows, beyond doubt, from those very conditions that call it into existence. Hence, in the field of the institutions of law and of the state, as in every other, the desire of, and faith in the assertion of the ideals, as well as the conviction of the ultimate acknowledgment of their authority in consonance with their truth, find a natural explanation in the theory of ideals. Every relative system, therefore, also necessarily shares, during the time of its predominance, such pretensions, and the systems of an absolute character differ from the former only in this respect, that the appropriateness of taking into account the effect of concrete circumstances must be always acknowledged by the former, and is absolutely rejected by the latter.

Consequently, these systems come forward not only with the claim that the realization of their doctrines should constitute the aim of legislation, but with the additional one, that they should be adopted as positive law. The extent to which this may anywhere actually happen, depends upon the nature of the part assigned to the organs applying the law, and to science in connection with legislation. It depends, further, upon how far the positive law is looked upon as complete, as exhaustively set forth, and as the emanation of the consciousness of the state, and how far

founded upon instinct or sentiment which has not yet arrived at clear consciousness. The authority allowed to any philosophical system with regard to completing and supplementing positive law depends, besides, under all circumstances, upon the degree of weight attributed, in general, to individual currents of thought thoroughly developed and perfected through generations, in contrast to public sentiment, although but vague. The historical school, has, in this respect, denied the admissibility of the consequences of any philosophical and systematic doctrine of the law, and, allows, at most, inferences to be drawn from the nature of concrete cases, for the purpose of supplementing existing positive rules of law, the effect of which results in giving, on the one hand, to such elements of the formation of law as lie hidden beyond consciousness an undue ascendency over the inferences obtained by scientific abstraction, and, on the other, quite properly gives, in concrete cases, to the interpretations derived from a less abstract conception of the law preference over those which proceed from its more general conception. The first of these postulates can be maintained only so far as the dominant society has not yet arrived at a conscious and systematic conception of its own interests, that is, as legal theory has lagged behind the positive formations of life, a circumstance which necessarily occurs with all systems of a metaphysical character, which, for this very reason, are unchangeable. This is the case all the more, since, in point of fact, such systems are empty in proportion to their generality, and, for the most part, draw their matter from the rules of some positive system of law antecedently developed, as, for example, in the case of the systems of the law of nature, which take their doctrines from the contents of the Pandects, which, torn from their historical connection, and mostly misunderstood, have thus generally supplied the materials for the more detailed propositions of the theories of the law of nature. As to the second postulate, it must be acknowledged to be well founded, for every social transformation can be effected but

by degrees, and, consequently, the development of it must always tend towards the nearer ideal rather than that which is more remote and of a higher order.

§ 198. That mode of classification, therefore, which is based upon the simplest differences between the systems relating to the fundamental principle of law and right, results in ranging under distinct heads the systems founded upon theology, those based upon metaphysics, and those derived from experience.

To the first of these three classes belong the systems which identify the fundamental principle of law and right with the will of the Deity or with its essence. The second group comprises those founded upon the order of nature or its laws, upon the human understanding or upon practical reason, and, finally, those which appeal to the moral sense as to an attribute inborn in man, eternal and not amenable to analysis. The third class embraces the theories of utility, the theory of power, as well as that theory which, although deducing the fundamental principle of law and right from moral sense, yet looks upon moral sense itself as amenable to experience, and not as absolute, immutable, and final.

The fundamental principles may be distinguished again upon the basis of a metaphysical conception, according as they are founded upon sense, upon faith, or upon reason, or—a division quite identical with the one last mentioned —as they are referred to sentiment, to authority, or to reason. According to the utilitarian point of view, the fundamental principles present themselves again, either as ascetic, that is, such as identify every worldly and practical advantage with evil, and seek the fundamental principle of law and right in antagonism to mundane happiness, or as founded upon sentiment, that is, upon sympathy and antipathy, or, finally, as based upon experience, and, at the same time, as showing themselves, in their ultimate analysis, always reducible to utilitarian considerations.

A further classification of the fundamental principles arises from their relations to those agencies from which

they are derived. Hence, they are either external or internal according as the standard of right is sought outside human nature, or is deduced from the latter. The internal fundamental principles are material, as far as they appeal to experience, or formal, if they are merely founded on the laws of human reason; or they may proceed again from both sources, in which case they are of a mixed nature. The material fundamental principles are either objective or subjective, according as they refer to possibility in connection with external experience, or to the internal sense; whilst the formal ones are founded upon the doctrine of virtue or upon the doctrine of right, according as they are able to derive right indirectly only from the legislation of reason, through the more general principle of virtue, or parallel with the latter, immediately from the independent legislation of reason. Amongst the external fundamental principles must be classified those directly theological and those appealing to the order or law of nature or of the world. The fundamental principles of the theories of power and of utility present themselves as internal, material, and objective; whilst those which are reducible to sentiment, to sympathy, and to the sense of fitness, appear as subjective; and those, again, in which the results of these agencies are conceived as susceptible of proof by experience, belong to the mixed class. The formal fundamental principle of the doctrine of virtue is the principle of attaining perfection and of the general moral legislation of practical reason; the fundamental principle founded upon the doctrine of right recognizes the immediate bearing of this legislation also upon law and right.

§ 199. The theological view concerning the fundamental principle of law and right accepts either the Divine will or the Divine reason, that is, the Divine essence, as the foundation of right.

The theory with regard to the Divine will is met with in all cases where law and right are derived from some positive revelation of the Deity, and, since the Divine will

necessarily presents itself as inscrutable and arbitrary, according to the human understanding, this theory appears, as a consequence, as antagonistic to every effort to found law and right upon a principle of order, intelligibly consistent and permanent. For this reason, every progressive philosophical attempt, which ascribes an independent value to the inferences of human reason, comes into conflict with this ingenuous and direct theological view; hence arise the first attempts, in the systems of science, to break with theology, and hence the growth of the conviction that, as Grotius expresses it, the results of reflection would prove right, even "if it could be supposed—which cannot be accepted without the greatest wickedness—that no Deity existed." These considerations, later, give rise to the doctrine, that justice is identical with Divine reason, that is, with the Divine nature and essence, which, being eternal and immutable, exclude all idea of arbitrariness; for, indeed, Divine will and Divine reason are only different manifestations of the same one and harmonious essence of the Deity, the notion of which naturally springs from the lofty ideal of monotheism, which was already formed in antiquity as being the only ideal answering higher moral and spiritual postulates. However, the process of thought which led to this identification is of an entirely metaphysical character; it is also connected with the hypothesis of the pantheistic theory, whilst, at the same time, it accords with all such theories as derive, in truth, the ideals from Divine reason, as is the case with the Platonic theory, or with such theories as identify the final weal of mankind with the dispositions of Divine providence, as is set forth by Leibnitz, Paley, and Austin.

§ 200. Hence, the theories founded on the notion of the order of nature are closely related to these last of a theologico-metaphysical character. Amongst them may be distinguished the primitive theories which conceive the notion of the order of nature from the course of the stars, from the unchangeable and regular rotation of day and night and the seasons, and which led to those ideas ex-

pressed in Sanscrit by *rita*, and in Latin by *ratio*, and which were, subsequently, also applied to the inevitable relations of human activity, such as the union of the sexes and the begetting and education of children. Later, this order—in opposition to the casual acts and enunciations of will of the gods, occasionally proclaimed and lacking internal coherence—is imagined as standing above the Deity itself, and as holding supreme sway, and finds its embodiment in the Greek expression *μοίρα*, and the Latin *fatum*. The agencies answering these terms also figured as the remnants of a more immediate religion of nature, supposed to have formed a most ancient stratum underlying the systems of more modern mythological polytheism. At a still further developed stage of thought, this Divine order is identified with the order of moral nature, and the fundamental principle of law and right was derived as following out of this, as is shown in some cases by the expressions used by Plato, and as modern writers, especially Stahl and Walter, have attempted to prove in detail.

Connected, but not identical, with this theory is that purely metaphysical view, which deems the order of the independent nature of things to be the fundamental principle of justice, that is, of law and right.

According to Plato, this doctrine follows from the hypothesis of the exclusive essential reality of the ideas; according to Aristotle, from the theory of causes, and from the conception that the nature of things is rational and that the qualities and differences of ideas answer the different features of natural existence. We find also the same current of thought in our century in Schelling's objective rationalism, according to which the functions of the spirit are entirely identical with those of nature, except that the former is, in addition, self-conscious, and that, as a consequence, the essence of the laws of nature may be discovered from those of the spirit.

§ 201. Whilst the order of things is, on the one hand, thus conceived as running parallel with rational conception, it may, on the other, be also conceived as that

blind law of nature, disconnected from insight, the rule of which extends over man also, and, as reflected in the feeling of power or of advantage, likewise serves as the motive of activity and as the principle of law and right. This conception forms essentially the foundation of the epicurean theory, but, as is indicated by its particularized inferences, it points at the same time the transition of thought from the metaphysical views to the theory of practical utility. A similar fundamental thought pervades Montesquieu's views in determining the spirit of the laws.

But this order and law of nature presents itself to man not merely as unconscious only, but also reversely, as the manifestation or emanation of the universal spirit, coextensive with all nature. Hence arise the pantheistic systems, which naturally at the same time figure as susceptible of being exchanged for monotheistic conceptions. The stoic philosophy of classic antiquity represents this view, which conceives the λόγος, the "word," as corresponding with the universe, and as its animating spirit, which creates at the same time its universal order and law, and finds its expression in the material series of causes and effects as well as in the ideal necessity of the good. Hence, obedience to nature is its fundamental principle of practical life; the moral aim is harmony with the order of nature, for which man becomes qualified by wisdom, and which, again, is practically embodied in virtue. The rule of virtue, again, is the order of nature, every man, as a citizen of the world, without regard to his individual situation, being its subject, and it is thus universal, immutable, and eternal.

We find pantheism built up with the greatest deliberation and with rigorous consistency, and applied to every group of moral ideas by Spinoza. His system, however, differs from the modern modes of thought founded upon natural science and experience but in this; it presents itself in theological phraseology; thus the law of nature appears as identical with nature in every direction, but also at the same time as the expression of the essence of the Deity, conceived as one, undivided and personal, and

in harmony with the latter and as its manifestation the individual soul also harbours rational love moving to veneration of the Deity, as the common fundamental principle of thirst after knowledge, and of action. Right, in this system, appears also coextensive with the sphere of real, and not merely apparent, strength, agreeing with consciousness, and thus as being essentially the will of the overwhelming majority in the state, which is, therefore, regarded as the proper source and representative of the sovereign power, the body of which is furnished by the state. Accordingly, this theory may be likewise conceived as a theory of practical and definitive power, if due regard be paid to its essence, independently of its form and origin.

Similar in its nature is Hegel's theory, which, in the dialectical process of the development of the spirit, starts from the identification of thought with existence, of the reasonable with the real, and views law and right as the objective spirit in liberty as an idea, that is, in the generality defining itself, in the idea, that an existence is the existence of the free will. Its fundamental principle is expressed as follows: Be a person and respect persons; personality being the generality of free will, and thus formal, self-conscious, and simple relativity—devoid in every other sense of any contents—to its own individuality, and consisting in this, that as such it is in every direction perfectly determinate and finite, but, nevertheless, stands in absolutely pure relativity to itself, and thus knows itself in the finite as infinite, general and free.

§ 202. Amongst the metaphysical theories are classified, in addition, the theory of moral order and of perfection, and the kindred theories founded upon the order of natural reason; which all of them proceed from faith in the indubitable truth of the ideas corresponding with reason.

The general results of human reason and human thought present themselves in this view as unconditionally right, and the problem to be solved is confined to the question alone, how it should be determined whether a thing really corresponds with human reason or not. Grotius and

Pufendorf still attribute great weight, in this respect, to tradition, as showing that the preponderating majority of men, in all ages and under all circumstances, held the same proposition to be true, as well as to instinct, which, according to their view, works in conformity with the laws of rational nature. Subsequently, in accordance with the doctrines of the Cartesian philosophy, the clearness and definiteness of thoughts furnish the standard whereby Wolf perceives the fundamental principle of morality, law and right in spiritual approximation to the idea of the Divine essence in perfection, and, therefore, regards morality as the duty to strive after perfection, only internally enforceable, and the law as duty enforceable externally as well. On the other hand, Malebranche sees the fundamental principle of justice, law and right in the love of the universal moral order eternally existing in the Divine reason; Cudworth in the ideas of pure reason; Clarke in the eternal fitness of the relations of things; and the later Scotch School, pursuing a similar chain of thought, in the judgment of common sense.

§ 203. A hardly perceptible transition leads from the theory of natural and right reason to the theories founded on sentiment; which were partly brought into view by Grotius and Pufendorf in their hypotheses of the social instinct and sentiment, and, having become popular during the latter half of the seventeenth century, especially in opposition to the apparently matter-of-fact and dry utilitarian theory of Hobbes, were associated with theological theories, representing, as they do, moral sense as having been implanted in man by the hand of God. Of such a character is the theory of Cumberland, who, in opposition to the quality of selfishness, which Hobbes accepted as fundamental, looks upon the greatest benevolence of every rational agent towards all others as the fundamental principle of law and right, especially since, through Divine love, human happiness is indissolubly connected with the cultivation of benevolence. Edwards, too, accepts this benevolence felt towards a particular being, in pro-

portion to his degree of existence, and in proportion to the degree in which that particular being feels benevolence to others, as the foundation of moral and legal order. The Scotch philosopher, Hutcheson, replaces this good-will by the general expression "Moral Sense," an expression which, since the beginning of the eighteenth century, became all the more popular, as it coincided with the general disposition of that age to look upon the attributes of reason and sentiment as parallel to, and corresponding with, each other, as may be found instanced in Spinoza's "rational love." Through its instrumentality it became, at the same time, possible to bring thus the doctrine of common sense as well as that of moral sentiment into harmony with that conception of the fundamental goodness of human nature, which swayed the public convictions of the last century, and was even generally adopted by the encyclopædists who, in other respects, were scientific in their efforts and discriminating in their criticism.

Adam Smith attempted, in his work on "The Theory of Moral Sentiments," to establish the doctrine of moral sense, by a more thorough and exhaustive psychological analysis, which was designed to be supplemental to the explanations of social phenomena contained in his great book concerning the wealth of nations. His fundamental proposition is, that men are so constituted as to naturally sympathize with each other's feelings; when the sentiments of another are such as would be excited in us by the same objects, we approve them as *morally proper*. To obtain this accordance, it is necessary that he who enjoys and suffers, should lower the expression of his feeling to the point to which the bystander can raise his fellow-feeling. On this attempt are founded the virtues of self-denial and self-command, and it is equally necessary for the bystander to raise his sympathy as near as he can to the level of the original feeling. In all unsocial passions, such as resentment, we have a *divided sympathy* between him who feels them and those who are the objects of them; hence the propriety of moderating them, whilst pure malice is always to be con-

cealed, because all *sympathy* is arrayed against it. In the private passions, there is only a *simple sympathy;* but with regard to the benevolent affections there is a *double sympathy*, with those who feel them, and those who are their objects. Sympathy with the gratitude of those who are benefited by good actions, prompts us to consider them as deserving of reward, and forms the *sense of merit;* as fellow-feeling with the resentment of those who are injured by crimes, leads us to look at them as worthy of punishment, and constitutes the *sense of demerit.* These sentiments require not only actions, but corresponding motives, being in their double aspect, compounded of a direct sympathy or antipathy with regard to the actor, or of a direct sympathy or antipathy with regard to the person affected by the action. The actor himself, again, places himself ultimately upon the standpoint of those in whom his conduct has excited either sympathy or antipathy, and, in the latter case, it is followed by remorse. Our moral sentiments respecting ourselves arise from those which others feel concerning us; we feel a self-approbation, whenever we believe that the general feeling of mankind coincides with that state of mind in which we ourselves were at a given time. The sentiment of the spectator is the standard of morality. The sense of duty arises from putting ourselves in the place of others, and adopting their sentiments respecting our own conduct, the rules of morality being a summary of these sentiments. "When we approve of any character or action our sentiments are derived from four sources: *first*, we sympathize with the motives of the agent; *secondly*, we enter into the gratitude of those who have been benefited by his actions; *thirdly*, we observe that his conduct has been agreeable to the general rules by which those two sympathies generally act, and, *last of all*, when we consider such actions as forming part of a system of behaviour which tends to promote the happiness either of the individual or of society, they appear to derive a beauty from this utility, not unlike that which we ascribe to any well-contrived machine."

The theory of Smith, as appears from its contents, is, on the whole, not metaphysical, for he does not consider the moral sense as an irreducible agency not amenable to analysis, nor as having the inherent force of proving itself, but derives it from data of human psychology, which he attempts to prove by experience. That, however, which the theory of Smith does not solve—and which might be elucidated only by means of comprehending his two great works into one from a higher point of view; necessitating, however, in order to accomplish this, a considerable enlargement upon the fundamental psychological propositions—is the explanation of the question how the tendencies of action arising from the secondary sentiment of sympathy relate in the process of the actual formation of human character to those tendencies of action which spring from the primary attribute of selfishness, and, further, of the question—which hardly engaged the attention of any philosophical thought during the last century—to what extent the individual psychical phenomena, nay, the entire order of individual ideas, may undergo a transformation under the influence of social community.

Sympathy is but one of the products of social co-existence, and is attended by numerous other modifying and restraining elements; individual development always depends upon the development of larger communities reaching beyond the spheres of individual life and interests, and its numerous factors cannot therefore be explained and accounted for by individual development itself, but only by the elements of the development of larger communities, nor can its various sentiments be explained by the individual conception alone, but, historically, by the organic changes, by custom, traditions, creeds, and by association of ideas. For this reason, therefore, every purely subjective system—and that of Smith is such—must necessarily be inadequate to grapple with the fundamental principles of law and right.

§ 204. The system of Vico must likewise be reckoned

amongst the systems of natural reason and sentiment, as is explained by him, partly in his dissertation concerning the uniform principle and aim of law and right, and partly in his "New Science," the strength and weakness of which are just the reverse of the qualities to be found in Smith's theory; for whilst, on the one hand, it affords undeniable proof of a thorough appreciation of the far-reaching influence of historical factors, it yet contains, on the other, constantly recurring metaphysical, and even theological, elements. Vico proceeds from the fundamental proposition that the law of nature, conceived to be identical with Divine purpose, is uniform and pervades everything; that man, partaking of the light of the Divine mind, becomes capable of knowledge; and that the discernment of the true and of the practically right springs from identical reason. Justice is recognized by the mind in the even distribution of the equal; as the good, it is practically adopted as a leading principle; the law of nature is, therefore, the selection of the good according to what we recognized as equal and just, or that principle which is necessary in order to effect the measuring out of the just utility of things. Every society rests on a certain degree of kinship, and springs from a sentiment corresponding with nature; the principles of this union are the desire for existence and knowledge, the shame of ignorance, and good faith, that is to say, equity, which is the just relation of persons to things, according to justice, or the rewarding of persons by things in conformity to justice, and, finally, the love of our fellow-beings, or piety. These principles are, in themselves, the applications of the great universal principle of justice; for, in truth, if justice, properly interpreted, regulates in itself the relations of man, equity regulates the relations of men amongst each other. What is true to the mind is good to the heart. In the establishment of this principle, and in the satisfaction afforded to the hearts, consists natural liberty regulated by the law of nature. This secures the free exercise of thought, transforms claims into rights, and saves any danger attendant on

the assertion of measures of just protection. Above the law of equity, from which the law and right of the present age spring, stands the law of social love, answering a period of higher development, having also regard to the exceptional needs of human life, which it transforms into rights. All these sentiments are the different modes or expressions of eternal justice, for they are founded upon it as well as upon equity, which is the application of justice, and upon piety, which is the extension of equity.

The science which secures the freedom of these sentiments, and marks out the path for the assertion of these rights, is that of jurisprudence, which is equivalent to morality, as far as the latter rests upon the rules of law; for jurisprudence, which, properly speaking, is the art of equity, is founded upon an infinite accumulation of small rules emanating from natural justice, but discoverable by jurists from the causes of the laws, and from the intention of the legislators. It contains an explanation of the laws, determined according to their causes, and teaches how to recognize their results in accordance with the different social wants. Moral philosophy, on the other hand, teaches the science of truth, which proceeds from a small number of ideal truths set forth metaphysically, which present themselves as the foundations of the order of the state, and as the standards of corrective and distributive justice, arraying in order the advantages and interests, in accordance with the two eternal standards of arithmetic and geometry. The concrete results of these sciences and sentiments are the systems of law and right, changing according to the three different phases characteristic of the cycle of civilization, the Divine, the heroic, and the human, which essentially differ from each other in the different conception of the part assigned to the Deity and to religion, and contain the different methods of discovering truth. The ideal, however, always lies in superhuman truth, standing above experience, and being purely Divine, and never fully embodied during any phase of the cycle of the world.

§ 205. The line of thought leading from the historical phenomena of law and right to its essence, which was thus first brought consciously forward in Vico's views, was, three generations later, developed in the doctrines of the German historical school of law, by Hugo, Savigny, Eichhorn, and Puchta, who, although they no doubt established a perfectly independent theory, were yet, through the intermediary of Herder, influenced by Vico's doctrines. On the other hand, Edmund Burke, by effectively applying the historical conception in the arena of political questions, contributed to its taking root; and this result was further aided by the circumstance, that the notion of nationality and the idea of the society founded on nationality had also passed into public consciousness, owing to the reaction produced by the ideas of the French Revolution and by the Napoleonic conquests, and sought support in the elucidation of historical precedents.

The historical school of law, therefore, regards law in the same way as it does language and morals in general, namely, as the manifestation of the spirit of the people, constituting the body of the nation. It is not merely consciously that the spirit of the people asserts itself and bears fruit; it is, on the contrary, brought most clearly into view in the very shape in which it is free from all admixture of the products of the individual philosophical reflections of the cultivated, so often saturated with foreign elements. Law and right have their foundations in the fellowship of the natural sentiments of those whose common conviction forms law and right, namely, in the sentiment of the people; and, thus, law and right are the result of the activity of the people, in such a manner that the individual is capable of conviction concerning them, not as an individual by himself, or as a member of a family, but solely as a member and constituent element of the people. It is this conviction concerning law and right that determines and produces morality, and not conversely. If law develops undisturbed, it passes through three stages of formation. First, through the period of inno-

cence, beginning with exclusiveness and unconscious unity, which is, in a people, the stage of youth, and in which the people, although poor in notions, is yet possessed of a clear consciousness of its circumstances and relations, and is thoroughly imbued with them. Next follows the condition in which it is divested of its own identity, and broken up into parts, the condition of multiplicity; until at last the third stage of formation is reached, wherein, by returning within itself, it obtains unity in multiplicity.

Hence, the historical school does not regard the sentiment of the individual, but that of the people, as the foundation of law and right; on the other hand, however, it acknowledges the metaphysical conception of this sentiment, recognizing it as not susceptible of analysis and as definitive, and is even disposed to regard it as derived from Divine inspiration, a disposition which may be found more thoroughly developed by Stahl. In spite of all historical tendencies, however, it must be noticed that the doctrines of the clear-sightedness of the original condition of the people, and its definite conception of law and right recall, properly speaking, the doctrines of the natural condition and of original innocence. On the other hand, the connection subsisting between the historical school and the conception of the law of nature, which had held almost unlimited sway previous to the rise of the former, is, in spite of all the endeavours of the historical writers on law to inaugurate a theory quite opposed to it, clearly indicated by the circumstance that, in their definition of the several notions of law, in the separation of private law from public law, and in the particular exposition of the categories of law, they continue to maintain the propositions and tendencies of the writers on the law of nature. This connection is, moreover, further elucidated by the fact, that the acceptance of the law of reason as a point of departure, and the conception of any subjective right as only of a sphere of power, springs from the very same fundamental idea as to the essence of law and right, to which its derivation from the practical law of reason of Kant had led.

These circumstances, however,—besides the explanation afforded by the law of the historical continuity of currents of thought—are additionally accounted for by the fact, that both the school of the law of reason and the German historical school equally laid stress upon the phenomena and testimony of the Roman law.

§ 206. Whilst thus the historical school, by virtue of its theory, almost positively denies the importance of the inferences of individual reason in ascertaining the fundamental principle of law and right, Kant, in his practical philosophy, most fully asserts the exclusive part played, according to his own view, by individual consciousness and liberty in determining the fundamental propositions of moral ideas.

In his "Criticism of Pure Reason," Kant sets forth that *a priori* synthetic judgments are impossible, except with regard to the conditions of the possibility of experience that therefore no metaphysical knowledge can exist, and that all knowledge can be derived only from experience, through the intermediary of the two sensuous intuitions, that is to say, of the conceptions of time and space, and according to the categories of the understanding. He maintains, further, that knowledge cannot even then correspond with *noumena*, the things in themselves, the essence, but involves only ideas which may be formed concerning phenomena, that is, the real. In his "Criticism of Practical Reason" and in his "Metaphysics of Morals," again, he lays it down, that reason, in aiming at the bringing about of actions, which in point of fact do not yet exist, but have the characteristics of a thing to be realized, that is, of duty, aims at an object which cannot become the subject of sensuous intuition, from the very fact that it is not susceptible of change, and cannot, therefore, be ranged under the conceptions of time and space. Thus, in the field of practical reason, owing to its own self-made laws, *a priori* synthetic judgments are possible, they presenting themselves as absolute commands of reason, and as possessing, although no external,

yet a practical and conceivable reality. Liberty, which is the essence of will,—will, indeed, being the capacity of desire with reference, not to the action, like arbitrariness, but rather to the motives of arbitrariness with regard to the action,—is simply the capacity of pure reason to be practical in respect to itself. This can be only effected by subjecting the rule of every action to the condition of its fitness to become a general law. Its laws are, therefore, purely formal, for they cannot contain any practical foundation; the command of reason to obey the good is valid, without regard to any possible experience. Accordingly, the laws of liberty, hence derived, may be called laws of morality, as contradistinguished from those of nature; and these, again, are laws of right as far as they aim at external actions and at their legality. Law is, therefore, the sum of those conditions, according to which the arbitrariness of one can be made to accord with the arbitrariness of another, in conformity with a general law of liberty; whilst the laws of practical reason are purely moral, if they claim to be themselves the motives of action.

Hence, the fundamental principle of law and right necessarily comes forward in Kant as devoid of any practical contents, although it is undeniable that, by the assumption itself of the coexistence of several free individuals—an assumption which, it is true, is not required by Kant's notion of morality, though unavoidable in the notion of right—a practical element, even if of the simplest kind, has been smuggled into it. It is natural, therefore, that where an attempt is made to proceed on this basis in deducing the rules of law, and in particularizing a system of law, a host of other practical notions also crowds in upon the process, such as the limited boundaries of the surface of the earth, the possibility of satisfying wants only by things existing in limited quantities, the differences of sex and age, as well as numerous other circumstances; and, hence, it becomes evident that the purely internal, formal, and juridical command of reason cannot, in itself, serve as a foundation for a complete

theory of law. Indeed, the evidence of the absoluteness of practical reason and of the indubitable and eternal justice of its commands rests merely on two hypotheses: the indisputableness of internal consciousness, and the law of the transcendental good, that is, of the fundamental principle of the consistency of reason, regarded from a practical point of view. Whenever this becomes a matter of doubt, and reason and consciousness are shown to have been historically formed and gradually called into existence,—although the laws of their formation cannot be ascertained by means of the analysis of individual consciousness—and whenever the same critical analysis, which was applied in the Criticism of Pure Reason to the several ideas, is applied to reason itself as a continuous condition or ability, the whole system developed from the legislation of independent and self-justified reason falls to the ground.

§ 207. The system of critical rationalism was, however, in consequence of the logical and historical necessity of the dialectical deduction of ideas to their last consequences, brought back, by Fichte's Subjective Rationalism, to the sphere of purely metaphysical theories, and led subsequently to Schelling's Objective Rationalism, and to Hegel's Philosophy of the Spirit. For, while action resting upon an *a priori* foundation, meant, with Kant, that the action shall take place according to such a rule, on the basis of the logical law of generality and of non-contradiction to itself as being asserted does not involve contradiction to itself, Fichte substitutes for this meaning his proposition, to the effect that the ego, merely certain of its own existence, shall act according to its conviction, recognized as a duty corresponding with its own law. For Fichte not only deems the rules of morality to be *a priori* derivable from practical reason—that is, from the will—but also regards will as the source of all knowledge relating to all apparently external circumstances, and conceives experience itself merely as a radiation of the will. As a consequence, Fichte will acknowledge nothing but moral philosophy. To him the world is but the material-

ized matter of our duties, and duty the properly real in things, and the only cause of all phenomena. Hence, liberty is merely the freedom of the individual, and not the idea of general liberty and equality, but purely an aim to itself; it is necessary philosophically, and not morally; and it is the right of the rational being to be himself alone "cause" in the world of sense.

But this law of self-consciousness demands that the reason should also recognize other rational beings, ascribing to them liberty as unlimited as that claimed by itself. This gives rise to mutual voluntary restraint, and to effect this, community of right is required. The difference between moral law and juridical law consists in this, that the ego contains, on the one hand, within itself the motive for determinate activity, which results in morality; whilst, on the other hand, it is, in itself, existence, power, free-willed, and acting, and thus gives rise to juridical law. Moral sentiment is, accordingly, love of duty for the sake of duty, whilst social sentiment is love of our own selves for our own selves' sake, and the love also of fellow-citizens for the sake of ourselves.

The personal will of the individual is thus, according to Fichte, absolute, and the universe and the law of nature are with him but the manifestations of the individual will. It was only necessary that the generality should, instead of the individual, be accepted for the subject of the will, as was done by Schelling, in order to transform this system into one of natural philosophy, and only necessary that every natural and historical phenomenon should be brought into relation with the dialectics of the spirit, as was done by Hegel, in order to render its being brought into connection with the historical conception possible, whilst, in addition, its possible theological relations are obvious.

The changes in the importance of these metaphysical systems, corresponding with the various shades of these conceptions, ensued much in the manner changes of fashion take place; they, consequently, left nothing of permanence

to posterity, except the conception of the notion of law, as the offspring of the will, which naturally manifested itself in the recognition, as the foundation of the system of law, of subjective right—understanding thereby right subsisting in such a sphere of power, as might alter the condition of another subject of right, legally protected unless the above-mentioned sphere was taken into account.

§ 208. Practical principles are, accordingly, hidden beneath every metaphysical system, no matter how strenuously these systems may aim at avoiding every practical principle, or how unconsciously they may be built on the latter. These principles, resting upon experience, are proportionality or equality, power, and welfare or utility. The first principle appears as a practical result in the theories proceeding from the essence of the Deity, from natural reason, and from the conception of virtue as harmonious or medial; namely, in the theories of Pythagoras, Aristotle, Leibnitz, Vico, Herbart, Krause and Trendelenburg. As to the principle of power, again, we find assimilating with it, in part, the pantheistic theories, such as those of Spinoza and Hegel, and, partly, theological theories, as the theocratical ones of antiquity, the mediæval, hierarchical, and the modern ultramontane and legitimistic theories; and, further, the theory of Stahl, the doctrines of the historical school, as well as the doctrines of Kant, Fichte, Schelling and Schopenhauer, which proceed from practical reason, that is, from will. The theory of welfare and utility, again, extending at times to the conception of felicity after death, is also connected with the early Christian and the post-reformational theories of a theological character, and even with the many-hued theory of Leibnitz, with the conceptions principally derived from the will of the Deity, with the theories founded upon the order of nature or of things, and with those founded upon moral sentiment.

Three fundamental theories may present themselves, accordingly, as consciously practical. The first, founded upon proportionality or equality, has been latterly only developed in its purity by Littré, although he does not

expound it in detail; it may, however, be also assumed as entering into Rousseau's theory of the will of the people, for the idea of the equal subjection and of the equal political rights of the members of society, occurring in this theory, can only be derived from the postulate of the absolute assertion of equality with reference to man. The identification of the will of the people with the good of the people is but an ultimate inference, and not the moving cause, upon which the system is constructed. The theory of proportionality or equality, however, can never be definitive; for in order that the abstract notion of equality should constitute an aim, it is necessary that it should be recognized as a circumstance affecting the satisfaction of human desires, and, in that case, it necessarily appears as a special application of the theory of utility.

§ 209. The notion of power is more concrete than that of equality, and, owing to the circumstances, that the quality of being enforceable constitutes the most general characteristic of law and right; that commands present themselves as proceeding from the more powerful, from the Deity, from the authorities, or from the multitude; and that human claims, the foundation of subjective right, can, on physiological grounds, only arise where there exists the sense, suggestion, or memory of the ability of at least partially satisfying them; owing to these facts power figures as the most primitive component element of the notion of law and right, and presents itself, moreover, as the consequence of theological or metaphysical principles, and as an attribute of the personified idea. Hence the reception, disguised, for the most part, and not open, of power, in various senses and ways, as the fundamental principle of law and right.

Spinoza alone gives it decided prominence, as being the manifestation of the Eternal and Divine Being and law, and thus as the direct source of law and right. It figures with Haller as resting upon theological principles, and as a natural preponderancy, ever giving body and expression to law and right. It is conceived, at times, as that strength, the sense and consciousness of which give rise, in the

individual, to aspiration, to the possibility of action, to purpose, to efforts at assertion with regard to the external world; and which, by this means, leads to the notion of subjective right; and, again, as securing victory in the continual struggle for existence, and as manifesting itself in the sum of those conditions under which a given organism may maintain itself and develop, and which, rationally conceived, become embodied in the conception of objective law. Ihering, again, views power as the means of realizing aims claimed by society for its own good, in consequence of which law and right present themselves as a system of social aims, secured by force, or as the voluntary self-restraint of power, from motives of selfishness, that is, as the policy of power, in contrast to morality, which, according to him, corresponds, not with the sense of power of society, but with its sense of utility.

All these systems are, however, defective, inasmuch as they can reduce but a portion of the elements of law and right to power, and power, accordingly, as a fundamental principle, proves too narrow a notion to admit of serving as a general standard. The explanation of the subjective claim, as derived from strength, leads us as yet to no explanation of law and right, for a claim becomes subjective right merely through its general recognition by society. Again, if we speak of deducing objective law from power, this question unavoidably confronts us: Since power manifests itself in various capabilities, forms and results —with which of these manifestations are the conditions of social life to be identified? The measure of power itself can be furnished by the result alone, and that not by an immediate and temporary result, but one permanent and definitive. Already in the most primitive cultural stages momentary preponderance differs in the conception of man from the reign of law and right; and if, again, we look upon law as the rule representing the principle of the maintenance of definitive and true power, it needs a further explanation; namely, why is it that the former is not always fully recognized? why do the notions of law and

right, and of definitive power, differ in the conception of men? and why do the purely practical notions of power and of utility diverge from each other?

§ 210. The most important among the theories resting upon a practical foundation, is the theory of welfare or utility, which throughout all history runs parallel with the metaphysical systems. These two notions may, indeed, be used as synonymous, but, from the point of view of the systems, they do not, in all respects, prove identical. The notion of welfare is more comprehensive than that of utility, and hence, although the theory founded upon it appears, on the one hand, as the amplest, it is, on the other, less clear, as its several factors are neither sharply defined, nor admit of being scrupulously weighed. Hence, the eudæmonistic doctrines, that is, those referring to welfare, seem to allow of being easily connected with the metaphysical systems, and often even accompany them; whilst, in the proper theories of utility, a foundation upon experience is more conspicuous. The notion of human happiness is separable from that of worldly advantage and utility, and admits of being associated with virtuous self-satisfaction and self-sufficiency, with absorption in the contemplation of abstract ideas possessed of reality, with acquiescence in the order of nature, with conviction of salvation in the world beyond, and thus with every ascetic conception of the world. Hence, there was hardly a theory down to Kant's day,—excepting those which hold human nature to be essentially wicked,—free from eudæmonistic relationship, the elimination of which from moral philosophy, through the absolute command of reason, was attempted by Kant alone. Indeed, most of the metaphysical theories conceive the reward of virtue and of obedience to the order of reason and the moral sense, to be not only happiness, but, in general, the attainment of worldly advantage besides. In this way it comes that we find elements of the theory of utility occupying a conspicuous place in the doctrines of Plato as well as of Leibnitz, in the conceptions of the Stoics as in those of Shaftesbury, all

founded on moral sense,—and, in addition, also in numerous theological theories.

The theories of antiquity, founded upon experience, are in general marked by eudæmonistic rather than by utilitarian characteristics, as, for instance, those coupled with the names of the different sophists, and, moreover, the theories of the cyrenæans, and of the epicureans. These also, for the most part, conceive of human happiness as the sole aim of action, and, accordingly, as the fundamental principle of law and right. The more primitive amongst these theories are, again, hedonistic, inasmuch as they either exclusively or preponderatingly look upon sensuous delights, being also agencies of spiritual pleasures, as constituting happiness, and worthy of consideration. In modern days, only a few dissertations of materialistic tendencies, hardly deserving of the name of philosophy, are of this character, and of these may be mentioned Holbach's, in the "Système de la Nature," which appeared under the name of Mirabaud, whilst the doctrines of Mandeville and Helvetius, which are usually ranged amongst these, do not properly belong to this group.

Mandeville, in his fable of the bees, argues that, since delight in anything not indispensably necessary is sensuousness and, therefore, weakness, and as virtue without self-satisfaction does not exist, everything which is beautiful and agreeable in this world springs from sensuousness, that is, from the weakness of the nature of man, and no kind of action of man is, properly speaking, founded upon virtue, for the ascetic himself either desires delights of another world or glory, which has its origin in the love of excessive praise alone, and, consequently, in the infirmity of human nature. His work, therefore, is in truth but a satire upon asceticism; whilst Helvetius, in his "De l'Esprit," attempts to demonstrate that, since man acts from interest, the order of his activity will be higher in proportion to the greater extent of the sphere of the community with the interest of which he identifies his own interest, and thus Helvetius, in reality, quite properly conceives the development of public

sentiment from selfishness, only that the conditions under which this may ensue, are explained by him in too mechanical a manner, and determined with a onesided tendency. The system of Hobbes, and, to some extent, that of Locke, may also be reckoned amongst those of a eudæmonistic character, but as standing nearer to the utilitarian theory taken in a stricter sense; for, in designating unlimited security or security confined to life and property as the aim of the state, they find also in that security the principle of law and right, which, however, surpasses all other human advantage to such an extent, that no standard at all can be derived from these systems with regard to the several rules of law.

§ 211. The theory of progressive perfection of Leibnitz and Wolf is likewise closely connected with utilitarian considerations, as is clearly expressed by Leibnitz; utility, indeed, leading to perfection, and being thus a standard of law and right. The notion of utility, again, in connection with this theory, as well as with the theories of moral sense coeval with, and akin to the former, becomes modified and fitted to serve as a basis for a general and independent theory in proportion as it is conceived as concerning not purely the individual, but the preponderating majority or the whole sum of the community. This idea of utility as the foundation of law and right, subsequently, in the course of the last century, pressed all the more to the fore, as greater attention was paid to criticism on institutions the realization of which through legislation seemed desirable, and as legislation was held directly, or in the last instance, to be a function to be exercised by all the members of society, or with regard to which it was deemed necessary that it should at least answer the consciousness of all the citizens. Hence Rousseau's attempt, (resting in other respects on a theoretically erroneous foundation), to identify, in his theory of the will of the people, the resolutions of the latter with the public interest, and this, again, with the essence of the private interest of every citizen. Hence, too, the endeavours of the encyclopædists

and of their followers to reduce every suggested reform to considerations of public weal worked out in detail—a mode of procedure which was employed with singular good fortune, more particularly in Beccaria's work concerning criminal law.

The theory of utility, however, was ultimately developed exclusively on its proper basis, and in its full significance in the works of Bentham, by whom the notion of public utility had been reduced to a rigorous definition, susceptible of analysis. The principle of "the greatest happiness of the greatest number," borrowed by Bentham from Beccaria, but invested by him with a new significance, may be used as a criterion, if, on the one hand, the individuals are looked upon as equal, and if, on the other, the conditions of happiness can be precisely determined. With respect to equality, Bentham accepts it self-consciously as the practical point of view of legislation; for although, in point of fact, men are not equal either in consciousness or in ability and discipline, nor even in physical and spiritual susceptibility, yet no one at all is capable of judging with mere human knowledge as to the degree of these qualities in another, and thus, if the state deviated from the notion of equality and applied different laws to different classes, it would run the risk of doing much greater injustice to those ranged under the different classes, than in accepting the practical principle of equality as a basis for the actual application of the law. With regard to the other task of determining the conditions of happiness, Bentham attempted the classification and commensuration of the advantages as well as of the ills of humanity. In this, however, he necessarily succeeded but indifferently and imperfectly, the ground occupied by him being unsafe, since he was unable to sufficiently take into account the relativity of pleasure and pain to human circumstances in all their variety and differences. This is the point which affords the chief cause for dissatisfaction with the theory of utility; for, as John Stuart Mill justly argues, the circumstance alone that the calculation of the conditions of the greatest

utility cannot be effected in every particular case, does not constitute a drawback to its theoretical reception, since this failing is common to all theories, and is, besides, actually supplied by moral sense and tradition formed on the foundation of experience. Besides this, however, there will remain the unsolved question of accounting, by the theory of utility, for law and right in those cases, in which the advantage of a future period is antagonistic to that of the living generation, that is to say, where it must be bought at the expense of sacrifices on the part of the latter cases, the frequent occurrence and necessity of which, in the course of human development, is borne out by the testimony of nearly every page of history.

§ 212. Herbert Spencer and his school took these circumstances into consideration, and perfected the theory of utility by inferences drawn from the doctrine of evolution, according to which, in the field of morality as well as in that of law and right, differentiation and adaptation lead to sentiments opposed to selfishness, and so produce a readiness of self-sacrifice for the attainment of objects indispensably necessary to the preservation of community, increasing in degree with the growing and greater extent of the spheres of which the individual has the sentiment of being a member, and in which he has obtained protection and culture, and, simultaneously with these, the possibility of realizing his aims of a higher order. Accordingly, the development of society consists in the establishment of new psychological relations arising in the surroundings of the community, under the influence of which the community, as well as its surroundings, become transformed by passing from the condition of relatively indefinite and disconnected uniformity, into that of relatively determinate and connected diversity—the constituent elements of the community becoming more and more decidedly individualized. Parallel to, and accompanying this evolution, go the amplification and enlargement of the sentiments and the dispositions and tendencies to action, which result in the establishment of ever-increas-

ing harmony between the conscious interests and instinctive endeavours of the particular individuals, as also between social and individual aims, ideals, and standards of criticism. Its motive causes, and the circumstances under which it originally developed, may, notwithstanding, have contained diverging influences, and even antagonism and collisions of interest, and may have required such abnegation and self-sacrifice on the part of the individuals with regard to each other, as always occur even in the most primitive societies, and such as every generation, during the phase of its childish impotence, claims at the hands of those who beget, educate, and cherish it. The fundamental principle of law and right is, upon this basis, not only utility, conceived as individual and social, but, in addition—supplementing and modifying it—that sentiment which has, without any mercenary calculations, in the course of the struggles and selections of the different social spheres, unconsciously developed for the strengthening of the social ties, and becomes embodied in the voice of conscience, as the tradition of the self-sacrifices of past generations, and as the result of continually, though gradually, changing circumstances. The principle may thus rise to increasing demands upon the individual, in proportion to the return-services on the part of the society.

§ 213. This principle, however, is susceptible of being expressed in a simpler way if the elements of social phenomena are kept in view, for every social development is attended by enhanced intensity and thoroughness of activity. In proportion as the differentiation proceeding in the surroundings of the society and of the individual increases, it is necessary that the activity, adapted to the satisfaction of the claims growing from such circumstances, should be more diversified and more effective, whether these claims have become conscious or not; but the development of social and individual consciousness must also accompany any progress. Hence human progress is always followed by the growth of the sum of the useful activity of mankind, and by

an increase in its availability. Moreover, two sorts of activity may be distinguished within the society; the activity of individuals, which proceeding directly from the inclinations and consciousness of the individual, serves his own purposes; and social activity, which secures that the individual activities shall not obstruct each other, and that they shall not exceed the limits necessary to secure the liberty of activity of other individuals, and which also occasionally concentrates the individual forces, which are not ready to combine voluntarily, into such activity as shall aim at the furtherance of a common, general interest. And since that state possesses the most perfect organism, which allows freedom to the greatest mass of individual forces and least requires to maintain order, and which, besides, employs force only where the voluntary co-operation of the individuals and of subordinate societies cannot, owing to lack of consciousness or of discipline, be obtained: that system of law and right must be also acknowledged to be most perfect, in connection with which the greatest amount of individual activity can be asserted at the least expense of the activity of the state, and under which activity in general is most available, the use of forces most economical, and thus that activity, which is directly employed to satisfy actual wants, is the greatest, whilst the relatively smallest portion of the whole sum of forces is consumed in the assertion and production of the consciousness and will of community. This economy in the activity is naturally relative, and is always in due proportion to the self-consciousness and discipline of the members of the society, in the same manner in which the sphere of liberty, compatible with order, must also be acknowledged as relative. Indeed, as soon as social restraint and government fall below the level of their necessities, the conflicting individual activities needs destroy each other and defeat their proper purpose. Our principle is thus fit to serve as a standard of the condition of different societies as well as of the different stages of one and the same society, and, therefore, as the general

foundation of law and right, for the value of either of them may be determined according to the measurable sum of available activity extant.

§ 214. In the discussion of law and right, this fundamental principle of activity, being constantly verifiable by experience, furnishes a fuller explanation than the principles of final power and of final utility, which are difficult of reduction to elements that are measurable and capable of precise determination. It, moreover, essentially agrees with the theories resting upon power and utility, for the sum of utility inevitably shows itself to be largest, and the interests of the particular individuals and of a society can obtain the fullest satisfaction where the disposable means for their assertion are most ample. The definitive utility of any society is, again, also greatest where the strength and activity of its members develop most freely, and the available activity is most effective. Moreover, the theory of activity does not contain such transcendental elements as the theories of power and utility are bound to reckon with, when summoned to choose and decide between the various kinds of power and utility, direct and indirect, temporary and definitive, individual and social, present and future. The ideal of law and right shows itself, on the basis of our theory of activity, to be identical in character with the ideal of morality, and the same principle which is a measure of the perfection of the society, serves also as a measure by which to judge of the perfection of the individual; for just as, upon these grounds, the ideal of a society consists in the harmonious development of all its members, qualifying all of them to exert their activity to the utmost, so the moral ideal of the individual presents itself as the harmonious and evenly-balanced development of the individual faculties in such a manner that the individual himself becomes thereby fitted for the most effective exertion. But the theory of activity agrees likewise with those founded upon moral sense, from the very moment that it is shown that moral sense itself has not been from the very first a per-

manent, unchangeable and indissoluble agency of human nature, but that it was formed and strengthened by slow degrees, in proportion as man, recognizing his wants and the means serving the purpose of satisfying them, learned to use these means properly, that is, in proportion as his activity became more effective.

Moral sense, at any given time, appears, in this meaning, as relative to the sphere of human activity, conscious or instinctive. In order, however, to prove this, it is necessary yet to elucidate the questions, why elements seemingly antagonistic to the principle of activity were mixed up with the notion of law and right, why the idea of law and right was identified with ascetic conceptions, and why, how, and to what extent the ideas of utility, of morality, and of law and right became separated from each other, as distinct and antagonistic notions. The explanation of this, again, can be obtained only from the history of the psychological development of the ideas of law and right.

§ 215. No matter how far investigation penetrates into the analysis of the primitive condition and conception of mankind, it never finds one single and universal principle, governing conduct, but always discovers several principles arising from different sources. One of these is furnished by caprice, corresponding with momentary influences; along with this we may regard the concessions made to fear, or to an exaction, or command presenting itself as derived from some overwhelming power, without regard to its motives. The other is instinct, such a disposition for activity, inherited through the organism, as has shown itself throughout generations to be continually necessary in some single direction, and the order of which appears as the result of accommodation, and of the permanent elements of organic conditions as well as of self-preservation. Such instinct, even in animals, curbs absolute individual caprice, that is, the unconditional sway of external and internal agencies, that have not yet arrived at consciousness.

Both these factors of the determination of primitive

conduct, contain also, however, elements not connected with selfishness, such as manifest themselves in the sense of maternal love, and of gratitude, in beings even of a relatively low degree. The comparatively long dependence of man upon his parents, in connection with the exceeding importance of mental development in him, the circumstances attending the education and constant discipline of children, which is all the more rigorous and effective, the ruder the prevailing state of things is, and, accordingly, their treatment on the part of the parents and of surrounding persons, all these combine to diminish even more the influence of purely selfish and capricious sentiments, and to assure the preponderance of customary modes of proceeding, which are already mingled with some slight elements of self-command, developed simultaneously with the faculty of taking consequences into account. The formation of such self-command takes place, afterwards, in progressive ratio with the development of the capacity for judgment, for abstraction, and for the consideration of remoter consequences. Immediate gratification, often imperilling more important results or a greater ultimate success, begins to be regarded and recognized as dangerous. Finally, a certain sense of reserve is begotten, which is constantly fostered by necessity, exacting, under primitive circumstances, submission to overwhelming external force.

§ 216. From the moment that differentiation begins to take place in any society, the influence of these considerations becomes also transformed in consonance with the positions occupied by the members with reference to the society. The stronger, the more sagacious, and the older use the strength of the others for their own purposes, and to satisfy their own wants. They therefore enjoy, in point of fact, rights as against the rest, but are, on the other hand, bound to consider more carefully all circumstances, to give their attention to the conditions of the maintenance, defence, and management of the society, and to fulfil duties in connection with these tasks. Their own interests prompt them, accordingly, to a certain measure

of public sentiment and public service, which have also a bearing upon their conduct, and exert in other respects an influence upon their commands, which, as to the rest, proceed from personal considerations alone. The material force at their disposal gives rise to sentiments of fear in the remaining members of the society, but this fear is already coupled with a sense of dimly dawning reverence and attachment; these, again, combine to beget promptings of self-sacrifice in cases of unavoidable and urgent necessity. General rules of conduct thus arise from commands, which, given at first to suit each particular case, but being repeated in similar cases, are at last conceived to be natural and indispensable. The proceedings corresponding with these commands become, at first, habitual, and later, in consequence of the tradition of their advantageousness, grow into customs. The first step, therefore, in the path of civilization is the formation of a strong crust of custom, capable of resisting the onslaughts of the chief or leader, and of restraining in the society, which as yet has hardly arrived at self-consciousness, nor possesses proper law or right, the outbreaks of individual passions and the injury resulting therefrom.

Thus, accepted customs and rules, recognized as the prevailing ones, are soon conceived to be absolute and the only possible ones, and every deviation from them is felt by every individual member of the society as an injury to himself. The primitive notion of order assimilates with the circumstances of the continuance of the social group. The faculty of imagination is but slightly developed, and is indeed incapable of rising above the actual circumstances, or of constructing for itself a picture of any better conditions than those existing in the home sphere. Every change appears dangerous and improper. Custom, as the peculiar property of the social group, becomes precious and a matter of piety in contrast to everything foreign and different; and, finally, the members of the society come to possess in custom a

standard which they may oppose to everything hostile and dangerous, the power of which extends even over those occupying a privileged position in the society, and generally over the chief himself.

§ 217. Opposed to such rooted custom, which thus becomes a tribe peculiarity and almost instinctive—the activity corresponding with the custom being at last conceived to be so natural, that even the sacrifices and self-abnegation demanded by it are not felt as such by the members of the social group, who do not imagine a different state of things possible with reference to themselves—we find in primitive conceptions of a religious character the germ of transformation, that is, of the development of consciousness, which can only arise as a consequence of the recognition of the possibility of contrary conditions.

The most ancient root of these conceptions—leaving the consideration of any influences originating in the faith of revelation entirely on one side—is, undoubtedly, man's disposition to ascribe, in the beginning, every force and event in nature to an anthropomorphous activity of such beings as are deemed to dwell in the things or to lie hidden behind them. This leads, first, to a personification of them, and, subsequently, by idealization and intensification of their human features, to a deification. The same result follows from the fact that man invests the objects of his memories and dreams with actual reality, that he is not able, at first, to rise to the abstraction of death, and thus imagines the rule of his ancestors, attributing changed forms to them, to continue over him for an indefinite time. Hence arise the worship of the departed, and the idolizing of natural objects, which subsequently, owing to the conception, becoming later a doctrine, of the migration of the soul, become intermixed and assimilate with the sum of those rites and ceremonies, employed either to conciliate and obtain the favour of the forces lying outside man or hovering above him, or to ward off their wrath, which constitute, in truth, the contents of primitive religion.

A distinction is made, at the same time, in the province

of things superhuman, divine, and religious, between, on the one hand, those belonging to the home sphere, the domestic spirits, so to say, which are looked upon as preponderatingly favourable, and on the other, the foreign and hostile agencies; the former being completely identified with the sentiments asserting custom and with authority, so much so that any supremacy or preponderance actually manifesting themselves in the society are ascribed to their influence and conceived as the gift of their grace. Hence, too, arises the transfer of the moral element of purpose to the religious field, the extension of faith to the convictions, and not merely to external activity. This especially takes place when greater force and deeper insight are attributed to superhuman Divine beings, and the conviction gains ground that even the most sacred things, and thus not only the outward actions, but their motives also, cannot remain hidden from the gods. In the same proportion, therefore, in which the society widens, and the power, asserted within its sphere by those of a privileged position, or by the leader, or prince, becomes organized and more effective, the power of the gods is heightened, and generalized; and all the more, because at this stage some stability and generality being recognized in the workings of nature, these attributes of stability and generality are also transferred to the Divine will. In this connection, the manner of propitiation and the possibility of man's influence over the Deity are also reduced to certain rules and are supposed to be capable of being rendered more effective, especially when, in consequence of closer external intercourse and of the admixture of foreign elements, the practice of occult proceedings, deemed to be of extraordinary virtue, and of charms and conjurations, is discovered. The power founded on these is conceived as embodied in the possessors of extraordinary and conspicuous qualities, who, proceeding in a manner incomprehensible to common human understanding and custom, and partaking of superhuman gifts, figure as the mediators between the gods and men. Some of them are deemed to have arrived at the possession

of Divine grace through their position, birth or Divine origin, whilst others conquer it, according to their own and their contemporaries' belief, by extraordinary self-denial, by self-torture, by sufferings exceeding ordinary human strength, and by their contempt of worldly enjoyments. This gives rise to the development of asceticism, that is, of that conception and conduct, according to which man gains power over the world beyond by rejecting things of this earth. This is at the same time closely connected with the idea of sacrifice, as of an act relating to the propitiation of the gods, or to service rendered them in hopes of return-service on their part. Owing, again, to the conviction of the religious solidarity of the social groups, the individual merit thus acquired, as well as the consequences of individual transgressions occasionally affect the whole society, and thus the ceremonies prevailing in religion, and the rites performed from a religious point of view become associated with the notion of the conditions of the welfare, of the continuance and of the development of the society.

§ 218. Moral sense, during this phase, contains therefore, on the one hand, the sense of claim, capable of being satisfied in proportion to the strength of those entertaining it, and, on the other, the attachment to custom belonging to the domestic sphere, and, identified with the idea of custom, antipathy to things foreign, as well as to those antagonistic to the traditional, love entertained for those acknowledging the ties of the more intimate social sphere, self-denial for the sake of that love, awe of the secular power as well as of the powers beyond and the desire of acquiring that power, a sense of duty, founded partly also on religion and even ascetic resignation fostered by religious hope.

In tradition, therefore, moderating caprice and the injurious prevalence of individuality and excluding foreign ways, and in rules of conduct arising from the conception of faith, but invariably such rules alone as are exclusively peculiar to the sphere of the particular society, authority and right are deemed to reside. At this stage of development every small consanguineous, tribal, and communal society

has its own special systems of law and right, of religion and of morality completely fused into one order of ideas.

The foundation of the sanction of the rules of such a system rests, again, on faith, the Divine power being, indeed, regarded as the most irresistible, and earthly power being conceived as its direct offspring; and gradually, at a more advanced stage of reflection, these rules and laws themselves are even interpreted as distinct precepts emanating from deified spirit.

§ 219. Somewhat later, as the frame of the society became more and more enlarged, these ideas originating in religion and custom were likewise generalized, and all that which seemed common, universal, and, in addition, rationally although mysteriously comprehensible, came to be looked upon as being of a higher order.

The notion of natural order now came into view as the embodiment of the eternal Divine will and of the social rules to be permanently kept in sight, and the extension of its sway over the circumstances lying outside of man was considered as resembling in character the dominion of human rules. The invariable uniformity of the instinct of animals served also to strengthen this conception, and enriched with a newer spiritualized element that most ancient connection which had since times immemorial subsisted between animals and religious conceptions, and may be found embodied in the supposed descent of savage clans from animals, as symbolized in their "totems." Together with these advances may be traced the commencement of the respect shown to the abstract and the ideal, and of the dawning conviction of the possibility of discovering such a general basis and such laws as should, in contrast to the daily modifications of the existing, be identical in all places, eternally immutable and infinite. The sacredness of the proper social institutions, however, is not thereby disturbed. The two tendencies of the dominant conception find their reconcilement in this, that whilst the Divine character of the rules corresponding with the fundamental principles of religion, of morality, and of

law and right, generally connected with these, is maintained, the special institutions of the society, on the other hand, as a kind of unwritten law connected with the most intimate life of the society and as the result of unchangeable customary law, are separated from the former, and are secured by independent ceremonials and formalities, now no longer purely religious in character. At this stage, with the conscious conception of customary law, and, often, with its derivation from codes founded upon superhuman inspiration and authority, which, however, seldom contain any directions as to religious matters, begins the independent course of life of law. A historical embodiment of this phase is presented clearly in the legal institutions of Sparta. The connection between law and religion lasted comparatively longer in Rome and Athens, for the primitive codes of these communities contained numerous directions relating to Divine matters, owing, in the case of Athens, to the deep religious sentiment of the community, and, in that of Rome, to the unprecedently practical view taken of religion. In consequence of this, and also because the progress of these societies was much more varied, and the contrast between the actual institutions of law and the unavoidable claims from a social point of view became much sharper, and, therefore, also the sense of possible injury to the society by retention of the actual law, more vivid, the change was likewise much more sudden when, with the legislation of Solon, and with the law of the Twelve Tables, the reign of positive civil law, entirely distinct and separated from the religious law, was asserted simultaneously with the birth of legislative activity. Besides, in Rome as well as in Athens, the above mentioned general principles and institutions of law, connected with the religious conceptions and the order of nature, served as a foundation for the development of a system of law extending beyond the particular social sphere and the communal state, namely for the formation of the *Jus Gentium*.

§ 220. Before, however, law could become entirely

secular and the conviction be formed of the possibility of its establishment in accordance with the human judgment, and of its adaptability to the needs of mankind, its abstract notion and sentiment had to assimilate definitely with that which was, in any event, conceived as the most abstract rule of activity, namely with the ideal of the harmonious and of the good, the realization of which is demanded by reason and by the eternal order of nature, but which cannot be effected by imperfect human nature.

Hence, the contrasting by the philosophically-minded Greek of Divine, natural, or ideal justice with the positive regulations of the state; hence, Plato's doctrine of immortality as forming the condition of the full realization of a state of perfect justice, effecting the equalization of all earthly wrongs and sufferings; hence, too, the bringing into relation of law and right, identified with the good, not only with the state, but with the individual also, and the co-ordination of the duty of the individual towards himself with his duties to the state. According to the Stoics, again, law appears as the direct order and emanation of the spirit of nature, manifesting itself in the universe as well as in the individual soul, in consequence of which the duties towards the state are recognized by this philosophy as being, in general, a supplementing part only of the duties to the universal society of mankind and to nature. The Epicureans, on the other hand, giving likewise prominence to the individual point of view, reduce the notion of law to individual utility, not temporary and partial, but definitive and general, and in harmony also with the advantage of others. Consequently, injustice, the defectiveness of positive law, is reflected in injury to an individual right.

With the practically-minded Romans, the identification of law with the greatest security and integrity of the state took the place of this abstract reasoning, and the spectacle of a body of objective law not answering requirements and imperfect, was by them eventually conceived as an injury to the community; the material injustice arising

therefrom they viewed, not as a wrong inflicted upon the individual, but as a wrong done to the state, the true remedy for which was not reasoning nor ideal endeavours, but social activity, made available through legislation. For this reason, although the notion of *jus* was associated with *bonum et æquum*, this idea of the just and equitable did not present itself as ideal and of the other world, but as capable of being actually asserted, and even embodied by the praetor and the jurist, from the point of view of general and public utility, *communis utilitatis ratione*.

Indeed, law, as the identification of the sense of the conditions of social co-existence with harmony and the good, is connected with the peculiar complexion of the interests of the communal society, in the same way as its assimilation with public expediency is connected with that of the interests of the conquering society which has for its object the accumulation of wealth for consumption.

§ 221. Christianity, as a reaction against the political conception of the Roman Empire, again assisted the movements of the individual conscience in obtaining ascendancy over social points of view, and considerations of power and public weal, with respect to the moral sense. Such considerations dwindled into nothing in comparison to those which owed their validity to the preponderance of transmundane interest. As a consequence, law and right, morality and religion, became again completely intermixed, and descended to a level lower than that previously attained by them in the prophetic and the primitive Christian doctrine, in Greek philosophy, and in Roman law. Subsequently, external influences began to preponderate anew in religion, although their degeneration into mere ritualism was prevented by living faith in another future life in the world beyond. Morality lost in internal value from the moment that it was viewed in the light of a duty, to be enforced by coercion and external discipline; and the meaning of law and right, sundered from the conditions of social co-existence, was shifted. They were the mere means

of fulfilling duty of an *a priori* character, though with the addition of positive force. If, nevertheless, the notion of morality remained more developed than it had been before its first separation from religion, and before it had been confronted with the ideal, this was owing to the circumstance that, on the one hand, traditions had survived, although scantily, from the Roman Empire and the Roman law, and, on the other, the Church itself had also become organized as a secular, dominant society, and, therefore, allowed room in its system, although often, by deviating from its own principle, for the recognition of the conditions of the actual co-existence of men.

§ 222. It was not a matter of mere chance, therefore, that the re-establishment of purely secular notions of law and right, and the general reception and preponderating influence of the Roman system took place simultaneously with the Reformation, during which the secular society, with the awakening of the national state, became again independent of the Church; or that the ideal of law and right was developed in modern times not by following in the tracks of the casuistic writers, who had adopted ecclesiastical and theological views as a foundation for their juridical theories, but by treading in the footsteps of Grotius and Hobbes, who entirely eliminated religion from their doctrines. Morality and law are, nevertheless, always found assimilated. In that age, the whole school of the law of nature saw in them, at most, but subordinate heads of an ideal system, and whenever attempts were made at distinguishing them, as by Pufendorf, Spinoza, and Thomasius, it was in view of the external standards of the possibility of enforcement, or of securing external peace, and not in view of any relation of morality or law to provinces and spheres internally distinct from each other.

At the same time, dialectics began to busy themselves anew with these ideas, in order to connect them with the various metaphysical propositions, and to reduce them to different abstract notions—which, apparently, are sharply divided from each other and spring from different prin-

ples, but which, historically, glide into each other in almost imperceptible shades and combinations—to the notions of power, of the Divine essence, of harmony, of perfection, of equality, of utility. Subsequently, when the attainment of a satisfactory result by these means seemed doubtful, dialectics again reduced these ideas to indissoluble qualities of a metaphysical character pertaining to the soul, to the moral sense of the individuals, to the spirit of the people, and the commands of practical reason. At the same time attempts were made to render these ideas independent of all experience. And this became theoretically necessary, since the constant aim of these endeavours was to obtain some simple principle as the foundation of law and right as well as of morality. In this very circumstance, however, resides the cause of their variety and scientific failure. For, as appears from the whole process of their development, the notions of morality as well of law and right are highly composite, and become more and more so, the higher the order of the civilization may be determined to be, and, consequently, the higher the order of the society is, to which they relate. A social interest of a higher degree presupposes the satisfaction of all antecedent interests, and, besides, the possibility of their constant and continued satisfaction within its own sphere. Law and right, therefore, as being the conditions of the realization of the social interest, necessarily become, together with the latter, enriched and enlarged, and as they embrace continually more and more elements, their correlative sentiment also becomes correspondingly complex and composite. Morality, again, relating even to considerations of future social interests, to the perfection of the individual rising above the sphere of the actual society and, at the same time, to the continual satisfaction of sentiments surviving from the past, is necessarily of a still more complicated nature, and composed of a still greater variety of complex threads. Both, therefore, in proportion as they become more developed, grow less simple and admit all the less of being based upon a single homogeneous principle.

Their differences, again, can be definitely and correctly recognized only when it is ascertained that, although they run parallel with each other, they are, in fact, always the rules of different social spheres. But the eclectic systems prove, likewise, unsatisfactory for the purpose of fully explaining and of rendering clear these notions. To place side by side the various ideas in their present meanings results in a mixture entirely differing from the result of gradual historical fusion of the very same elements; for in such a fusion each element or idea figures, not with the significance it possesses to-day, but with the meaning it possessed during that phase of development of human thought, when it first appeared and was applied to a moral purpose, and during the process of which they were not only acting and re-acting with respect to their common result, but also, incessantly, mutually upon each other. For the same reason, analysis founded upon experience cannot resolve the notions of law and morality entirely into transparent, definitive, and simple factors. Nor, again, is logical and psychological analysis, even if most consistently applied, capable of penetrating that residuum of the elements of sentiment, antagonistic to, and yet inseparably mixed up with, each other, which manifest themselves now as the voice of conscience opposed to the law of the society, now as present expediency opposed to the conditions of future well being, and, again, as the incompatibility of the ideas of liberty, equality, and fraternity, ideas which constitute alike the component elements of the modern conception of right and of those of a condition regulated by law. The expression of these in Kant's absolute Command of Reason, in Stahl's and Krause's religious resignation, or in Eötvös's faith in Christian culture, in the sentiment of the people as demanded by the historical school, in the enthusiasm for the notion of humanity, assumed by the followers of Comte, is but a confession, by all alike, of the inefficiency of any explanation which merely goes back to the individual.

§ 223. It is not only the laws of super-organic existence

in conscious community, however, that point to such an indissoluble element. In physiology it may also be seen that the agencies by which the claims of individual life can be most fully satisfied, and which, in the amplest manner, contribute to the development of the individual, are not identical with those which combine to promote the preservation of the race. Self-assertion amidst actual circumstances, depends upon other qualities than adaptability during long periods of time to enduring conditions; and thus the success of the struggles between various societies, and of individual struggles within any society, and the conditions of development of the societies themselves, and of the welfare of the individuals, do not accord with each other in every particular. Law, which at first answers the latter conditions, assimilates more and more with the former in the stages of its higher development. But at the same time, since, in a society of a higher order, the individual also obtains—not, indeed, in proportion to its proper internal relations, but in proportion to the order of any inferior society—more room for his own development, individual liberty is likewise benefited by the progress of the law, although right contains a continually growing element of social considerations. From this it becomes apparent that, in explaining law and right and morality, individual psychology must be supplemented by genetic explanation, that the hypothesis of self-interest and of individual sentiment is insufficient to account for the phenomena and rules of self-command; that social coercion supplies and develops conscience, and that it is only the external history of the formation of law, and the effect of its various forms, springing from various sources, that can duly account for the entire development of the notions of law and right.

CHAPTER XIV.

THE SOURCES AND FORMS OF LAW.

§ 224. The different kinds of formation of the law, and the forms in which it presents itself as externally observable, are, properly speaking, those modes by which authority, that is, the sense of social and individual claims, obtains recognition. For the elements making up authority itself are essentially the same as those of any overwhelmingly important claim, that demands absolute satisfaction, and presents itself as a claim of the society. It is, in fact, merely a question of concrete embodiment, whether it shows itself as framed into an injunction, or rule, presupposing obedience—which obedience may be voluntary, founded upon the motives of will, accepted by conscious judgment, or may arise from the effects of moral force—or whether the recognition of such a claim manifests itself in accommodating conduct and in custom, unconsciously appropriate. But this very contrast appearing possible in the two classes of concrete embodiment, points to the importance which the different forms in which these notions present themselves, possess from the point of view of the consequences of human conduct, and which are likewise connected with the relations in which these conceptions stand to their supplementary and secondary constituent elements, and hence also with the various kinds and degrees of human action, of the societies, of their central principles and their interests. From these circumstances, therefore, arises the connection of the doctrine

of the sources and forms of law with the history of the development of the idea of law, as well as their internal relationship. For, although the two questions, by whom and in consequence of what, on the one hand, law was created, and on the other, how it manifests itself and in consequence of what circumstances it is recognized as such, can be separated from each other and are independent, yet their respective subjects lie so close together, and, connected with the continuous development and regeneration of law as well as with the modifications of its recognition, mutually interact upon each other to such an extent, that the solution of any problem referring to either of them cannot be effected without involving a parallel explanation relating to the other.

§ 225. The difficulties attending the solution of these questions may be ascribed, in a great measure, to the various meanings in which the terms "sources, and forms of law" are employed by the science of law. It is sometimes customary to designate by the term "sources of law" the fountain-heads from which knowledge concerning some existing law can be derived, these so-called external sources possessing general scientific interest only as far as they shed light upon the history of law. At other times, again, it is understood to mean the mode in which law appears, and in consequence of which, it can be recognized as such, in which sense the term "forms" may be also employed instead of "sources." It is further used to designate the authority from which law derives its force as law, and, finally, the causes prompting this authority to call into existence law of a certain tendency and containing certain matter. An additional occasion for confusion, especially as regards the two latter meanings, arises from the circumstance that the foundations of the origin of positive and ideal law are frequently mixed up.

Ideal law is always but the result of abstraction, and of the philosophizing operations of the mind; hence its direct source is exclusively human reason, which invariably finds the ground for considering some rule as belonging to

ideal law in some proposition which it accepts as the fundamental principle of law and right, that is to say, in that essence or attribute by which ideal law can be recognized, and its establishment and assertion rendered possible.

The real law, that is to say, positive law in the past and in the present, and what may become such in the future, can, on the contrary, arise only from social recognition, which may be brought about by the different organs or representatives of the social consciousness and will, in which action these factors may be governed by different motives, and which may manifest itself in various ways.

It is, therefore, most correct to designate the organs of social consciousness and will, such as the whole people, or the bearer or the several organs of the sovereign power, as the immediate sources of law; and the motives for considering law positive, that is, valid, such as Divine power, human judgment, individual or public sentiment, and the will of the state as regards its supposed conditions of existence, as the mediate sources of law; whilst the manner of the appearance, and of the external embodiment of law, may be called its form.

§ 226. The doctrine of the forms of law, however, became also complicated, owing to a distinction which played a prominent part in the history of law, and which placed into contrast with each other two ideas not clearly defined, namely, the written law and the unwritten law. Both the written and the unwritten law were, indeed, at first taken in their literal sense by the Greeks. They looked upon the codes and the several recorded laws and resolutions of the people as written law; and upon custom and, more particularly, upon the propositions of the ancient system of law of Sparta, which, although conceived in definite language, were never reduced to writing, as unwritten law; and sometimes considered also as such, those subordinate customs of secondary importance which related to spheres of human intercourse, the regulation of which was deemed by the Greeks to be a matter of indifference

and beneath the proper dignity of law. Subsequently, however, the unwritten law was, in opposition to the positive law of the state, conceived as the philosophical and universal law of nature, generally valid in all places.

The Romans, again, employ the two expressions in an alternate sense. They sometimes take the *Jus Scriptum* in its literal sense as meaning positive statute law as well as recorded custom and scientific law, and at others purely in the sense of law declared as such by the organs of the state, invested with legislative power. General customary law, and sometimes also jurists' law, on the one hand, and the philosophical law of nature, on the other, constituted the *Jus non Scriptum*. Later, during the Middle Age, Holy Writ was designated, in the first instance, by the word "Scripture"; and, on the other hand, the whole Divine law was conceived as positive; in consequence of which written law obtained again a narrower sense than positive law, and was invested with the special force of indubitability which was subsequently, by the public opinion of the age, transferred to every other written record as well. In order to escape this complicated division, some of the jurists, as Austin, for instance, afterwards adopted, instead of the distinction between written and unwritten law, the division into promulgated and non-promulgated law, the former deriving its force, directly, from the public recognition of the state, and the latter merely from its silent recognition, such as cannot be immediately discovered as being the will of the state, but appears to be such in a final analysis.

§ 227. The main difference, with regard to the embodiment of law, consists in its being either a rule declared beforehand, or manifesting itself in special cases, or in its appearing as custom.

A rule of law is always a precept which, in order to bring about a certain state of things, conceived as an object previously marked out, exacts, permits, or prohibits certain conduct, either absolutely, or conditionally in the

event of certain circumstances occurring or in the absence of certain circumstances. Every single law, therefore, presupposes a social organ corresponding with it, a differentiated, self-conscious, higher power, which is, during periods rising above the level of primitive rudeness, recognized as the supreme power of the state and as its proper organ; and it further presupposes subjects possessing consciousness, who from ready conviction or through moral coercion, that is, through fear of consequences, are impelled towards an appropriate activity, or can be compelled by material force to obey the precept given, and to make good any injurious results arising from disobedience to it.

A law may be, at first, a command directed to individual persons, for a special occasion and referring to some particular action; afterwards it may become in every respect general, so as to apply to the entire activity of all the subjected individuals and social spheres; it may, again, casually, by emancipating a part of this activity, leave it to the pleasure of the individuals, or empower them, according to their inclination, to follow one of the several modes of proceeding marked out, and then it is called, in opposition to absolute law, a dispositive law. But it may likewise determine, in case of certain proceedings on the part of individuals, what consequences should be ascribed to them except when those having a corresponding right have decidedly disposed otherwise: such a permissive law being, therefore, in that event, likewise supplemental.

Custom, on the contrary, does not, in itself, appear in the form of a rule, although theoretically a rule may be and is usually derived from it, and may be asserted by force whenever the self-conscious application of laws has become general in a given society. But as long as custom prevails purely as such, it manifests itself, for the most part, in the voluntary and unconscious, although ready, adaptation of men to some mode of proceeding, a deviation from which under ordinary circumstances cannot be conceived by them as possible. They were originally prompted to adopt such

mode of proceeding by the consideration that it is easier to repeat a proceeding once taken, no matter what circumstances may have given rise to it, than to initiate a new one; and, further, by the circumstance that the more frequently any line of conduct is followed, the more inconvenient it becomes to devise new modes of proceeding, differing from the old ones; and that every new beginning is attended by greater trouble than the continuance of accustomed ways; the customary proceeding being, besides, owing to natural selection, nothing else but the most fitting accommodation to the agencies operating during the process of habituation, and, accordingly, on the average the most expedient. Later, as changes arise in external circumstances, or as the sphere of any society is enlarged by the accession of individuals as to whom the operation or influence of the custom in question has not been asserted at all, or asserted in a lesser degree than upon the rest, there may arise doubts with regard to the object and proper matter of the custom, and even as to its existence, and cases of conduct diverging from custom may then occur.

Custom, in consequence of the antagonism thus arising, becomes conscious, and supplies the foundation for the development of legal institutions and of customary law, expressed in rules. Men soon begin to reflect on the causes giving validity to the latter, especially if, side by side with the rules of customary law, there prevail other rules of law, consciously framed and derived from some palpable authority. Hence, besides the conception of the real law-creating organs, that of abstract agencies becomes formed to which a similar authority is attributed. It is, likewise, owing to this, that, concretely, numerous forms of law appear of a mixed nature, and occupying an intermediary position between the law comprehended in consciously framed rules, and that derived from custom.

§ 228. We may therefore distinguish according to express or implied recognition or customary obedience, and,

additionally according to the forms in which the law manifests itself:

1. Laws emanating from the sovereign power of the state, and constituting rules of law declared by its proper organs.

2. Such rules of a subordinate character as are not issued by the representatives of the supreme power themselves, but originate with inferior organs, invested by the sovereign power with a limited authority to devise such rules; such, for instance, was the Praetorian law, which, however, owing to the peculiar combination of the agencies of development of the Roman law, embraced also elements of customary law.

3. Such rules as emanate from autonomous spheres, such, therefore, as correspond with subordinate societies, but are recognized by the dominant one, and casually act as the intermediaries of its will.

In all these three cases law appears directly as a rule authoritatively declared.

Essentially differing from the latter, forms of law may be established in which the law can be discovered in a concrete manner through particular cases only, and its rules deduced from them ultimately by means of theoretical generalization.

The establishment of such law, which may be appropriately called case-law, may be effected in the following ways:

4. By such organs as are especially authorized for that purpose, as in the case of judicial decisions serving as precedents, or of the law derived from the *Auctoritas Prudentum*.

5. By customary practice, as with general customary law, or with that confined to some portion of the territory of a state or to a particular class of its society. The real source of such customary law, from the point of view of the absoluteness of the sovereign power of the state, is the exercise of the legislative function by the special society in an autonomous manner.

6. By common judicial practice.

7. Through the opinions given by jurists with regard to the nature of special legal relations.

Law may also arise on the basis of the natural development of the science of law:

8. In consequence of some positive ideal having been proclaimed, as instanced by the *Jus Gentium* with the Romans, and by equity in England.

9. By accepting a general ideal as the aim, as in the assertion of the systems of the law of reason, or of the law of nature.

From the point of view of the causes, again, owing to which law is considered as such, its different kinds are:

1. Laws resting on Divine authority, which are either—

(*a*) Immediately derived from Divine inspiration, serving as a foundation for judgments deciding particular cases, as the *Themistes* of Homer, and the most ancient *Domas* of the Anglo-Saxons; or—

(*b*) Founded on Divine revelation or inspiration, on sacred customs, traditions, laws or codes, such as the most ancient Hindoo and Jewish customs and codes; further, the codes of Minos and Numa, or the custom upon which the proceedings of the Athenian tribunals of blood were founded.

2. Those founded either instinctively or consciously upon considerations of special expediency, and which again are—

(*a*) particular judgments, such as the Anglo-Saxon *Domas*, were preponderatingly, and as the ancient Roman *Leges Regiae* were alleged to be; further the decisions founded upon the *Auctoritas Prudentium*, before the jurisprudents were formally invested with the right of framing laws, and before such decisions appeared as the results of scientific and systematic conceptions;

(*b*) The secular customary law;

(*c*) The law founded upon legal fictions, on extensive interpretation, and upon analogy;

(*d*) Particular laws.

Finally—

3. Those drawn as an inference from any fundamental principle, or from considerations of some well-matured system, such as—

(*a*) Equity;

(*b*) The scientific law of nature, or of reason; and—

(*c*) The products of systematic legislation, and especially the codes compiled on scientific principles.

§ 229. Historically, however, these various kinds of law, springing from different sources and embodied in different forms, commingle with each other, and mutually interact upon each other, although, from their first appearance, they follow, in conformity with the different species of authority, and with the proper recognition of the different notions of law and the state, the order leading from the more primitive to the more and more perfect. Yet, since the history of mankind does not present a continuous and gradual development, but such as has been frequently interrupted, and which, having returned again to a primitive stage, has started anew from that point, under the influence of preceding traditions of a higher order which have survived,—for every dominant society raises the system of laws with which it is connected to a higher level than the one from which its development is again begun by the society succeeding it in dominion,—it follows that the phenomena, through the comparison and analysis of which alone a general picture of the development of law can be obtained, are even more complicated during the later processes.

Amongst the savage and semi-savage groups and tribes there may, to this day, be observed that rude condition, in which individual caprice is only curbed, partly, by entirely unconscious custom, and, partly, by the arbitrary power of the chief or of others who have acquired authority by chance, or of wizards, readers of dreams, medicine-men, and soothsayers, mutually restraining, although in an irregular manner, their own arbitrary powers; in which condition, however, any mutual understanding casually arrived at, for the purpose of starting and carrying out some

common enterprise of importance, amongst those taking part in the venture, by taking counsel with each other, is paramount with regard to that concern.

At this stage, therefore, may be discovered side by side although quite undeveloped, the sources of every later species of authority, and the germs of every kind of law, the preponderating ascendancy of any of them over the rest depending upon the particular formation of sovereign power, which may obtain supremacy owing to the influence of external circumstances. It is, however, worthy of note, that it is not those amongst the social groups which are isolated and of a comparatively more peaceable disposition that rise to the highest civilization, but those groups alone, the faculties of which become inured through the vicissitudes of circumstances, and which, the more they come in contact and, consequently, in conflict with others, become naturally more aggressive and disciplined, and in the society of which the process of differentiation is, thus, the most intense.

The institutions of societies without the periphery of European civilization, that is to say, of those which developed independently of the civilizations of Greece and Rome, rise nowhere above the level of religious law. In Egypt, in India, as well as amongst the Jews, the highest stage of development is represented by sacred codes, deemed to be of Divine origin, in which the secular law is entirely mixed up with the religious, but yet always and everywhere, subordinated to, and deriving its authority from the latter, and is supplemented by general custom, which, too, is accounted for by sacred traditions. In these societies there is also everywhere established a sacerdotal order, who interpret the rules deduced from religious tenets, or from custom, and supplement them by means of fictions, either applying these rules themselves, or acting a decisive, advisory part in their application and assertion. It is hardly possible to trace and indicate with any precision the various phases preceding this stage, since the stationariness of the traditions and religious proposi-

tions, in their rigorous forms, naturally obliterates all earlier memories, and a society, on attaining extreme stability and definiteness, loses, together with the conditions of future development, the traces also of its earlier processes of formation. Yet the assumption is unavoidable that in such societies customary law developed from unconscious accommodation and custom, and, on the other hand, that the systems of religious doctrine became consolidated merely from isolated conceptions and dispositions slowly coalescing with each other. Indeed, the most ancient songs of the Vedas decidedly point to a period in which the personifying of the agencies of nature into divinities was still wavering, as was the application to the relations of life of transcendental notions, arising from religious conceptions and from primitive philosophical abstraction, which, at most, might manifest itself in special cases of doubt in judgments and decisions relating to concrete circumstances.

§ 230. The several steps in the transition from barbarous conditions to the cultured stage can be traced with much greater particularity amongst the Greeks. With them the phases and forms of the development of law are clearly brought out, one by one, from the age of Homer to the decay of the independent societies of Greece. Distinct from general, unreasoned, ancient custom, there appear, at first, in the divinely inspired *Themistes*, the declarations of law relating to special cases, in judgments which derive their authority from this very inspiration by the divinity, and not from the authority of the princes, or prominent persons sitting in judgment and serving as organs of justice, or from the approval of the mass of the people, standing by and expressing their sympathies. According to tradition, this phase of development was followed by that of mythical religious codes, such as the Code of Minos, codes which were imagined to be summaries of all the rules of Divine as well as of human order. It is possible, however, that the supposition of these mythical codes had its origin only in the circumstance that the

imagination of the people sought for a prototype of the products of the semi-historical period, and referred it to the remoter pre-historic period, so to say, and that, proceeding at the same time from the notion of legal and consciously established order with which they became familiar in later times, they deemed it necessary to ascribe the ancient faith and custom, which had survived from the times of the Aryan migrations, to the dispositions of almost superhuman beings, blessed by direct converse with the divinity, and to derive them from their codes. It is, at all events, possible to follow out historically the stages of development succeeding those mentioned, when the communal society, after its earliest establishment by means of conquest, supplements and consciously modifies the ancient customary law, by such an organic and connected body of institutions and propositions of law, as expresses the conditions of the settlement and social organization after the conquest, and presents itself as the means of their preservation. Of such a nature was the customary law of Sparta, founded upon the laws of Lycurgus, likewise ascribed to Divine inspiration. Such was that which, in Athens, was derived from the laws of Draco, but was not able to assert itself in every point, in opposition to the more ancient general customary law; and such, to some extent, was the Code of Solon, of a partly similar character, only that in this case the positive and conscious establishment can be proved historically.

In Athens this system of laws was succeeded by the investment of the people with regular legislative functions, in connection with which a distinction was soon made between organic and permanent laws, requiring the co-operation of a greater number of factors and longer preparation, and the resolutions of the people bearing upon special cases. Finally, the current of the philosophical cultivation of the idea of law set in, without being, however, in Greece, followed by any scientific recasting of positive law, or by its systematic compilation.

§ 231. Much slower and more gradual than the development of law in Athens was that of the Roman law, which constantly combined the almost Spartan tenaciousness of the customary law with the conscious application and formation of new laws.

The institutions of the ancient Aryan customary law formed here the first body of law, but hardly any memorials of their earliest manifestations have been preserved in decisions, like the *Themistes*, or mythical codes; at most a parallel might be drawn between the former and the traditions of the *Leges Regiæ*, supposed to have been digested in the *Jus Papirianum;* and between the latter and the code alleged to derive from Numa, from which broken fragments were also cited by some writers of antiquity.

The work of legislation began in Rome, as in Athens, with the period of the expulsion of the kings, and of the definitive establishment of the communal state, not, however, in the shape of a general comprehensive code, but in that of special public laws. At the same time, the development of the civil law, which as yet was not influenced by the opinion of the mass of the people, was promoted by the interpretation of the customary law effected by the college of the Pontiffs. With the establishment of the law of the twelve tables, Rome afterwards obtained a code regulating all the relations of the state, and embracing also the former customary law and its interpretations, which was a memorial of the first great coalescence of the classes, of the fact of the state having become homogeneous, and of the conscious recognition of the harmonizing interests of the community. This code was, for this reason, invested with the whole authority of the conditions of existence of the state, and with an almost religious sacredness,—referred, however, not to the gods, but to the notion of country,—and was held during many centuries, although enlarged by several laws, to be unalterable in text. Hence, too, it served as a foundation for judicial explanation and for scientific definition, effected, partly, by extensive interpretation, and, partly, by the aid of legal fictions.

In course of time, the principles of the *Jus Gentium*, (the roots of which also extended back into international custom connected with the ancient and sacred law), under the influence of claims arising from the intercourse with foreigners, and of the sense of equity, experienced a further development within the independent sphere of action of the prætor, a development assisted by the temporary legislative power of the prætor exercised by means of interpretation, of legal fiction, and of analogy, and also by taking into consideration special expediency.

The rules thus established, and, for the most part, invariably renewed and confirmed by the successive prætors, obtained, owing also to the soundness of their motives, as it were the force of customary law, and extending, in consequence of the influence of equitable considerations, likewise to the regulation of the relations subsisting between the citizens, crowded step by step into the place of the proper ancient civil law, and were, at the same time, supported and supplemented by the results of legislation which asserted themselves more and more in the sphere of private law.

The system of equitable law, *Jus Æquum*, which thus arose, was likewise associated with the ideal law, *Jus Bonum*, and, subsequently, when Greek philosophical theories became popular in Rome, especially through Cicero, assimilated also with the law of nature, which, though embracing a wider sphere, was not always held to be capable of being actually established and asserted. At this point, in connection with the transformation of the communal society into the society of amassing wealth for consumption, began the systematic attempts at codification, yet, owing to the consequences of this very transformation, and to the circumstance that the theory of the *Jus Naturale* had just met with responsive sympathy, the matter of the law was not yet really ripe for codification.

There were required the arduous labours of four generations of jurisprudents, declaring their opinions, *responsa*, already invested with public authority with reference, not only

to cases which actually arose, but also to supposed theoretical, although always special, cases, before the *Jus Honorarium*, asserting the principles of *Æquitas* and of the *Jus Gentium*, was finally established in the *Edictum Perpetuum*. The exertions of four further generations of jurists were also required before every proper consequence deducible from the *Jus Naturale* could be infused into the body of the Roman law. This stage, again, was very soon followed by collective arrangements of the imperial *Constitutions*, simultaneously with the recognition of the Christian Church by the state; and, finally, two centuries later, when the Roman law had, under the influence of the ecclesiastical society, been transformed to a point beyond which the reconcilement between the conquering imperial spirit and the ecclesiastical spirit was no longer possible, the cultivation of the Roman law was definitely concluded by the compilation of Justinian, extending over every department of the law.

The history of the development of law in Rome also supplies the most important material for the doctrine of the sources and forms of law. For the Roman law, together with its material contents, was, in yet three instances, called upon to exert a permanent influence upon jurisprudence and its developments; namely, during the Middle Ages, beginning with the twelfth century, through the labours of the glossators and commentators; again, from the sixteenth century, through the systems of the law of nature and of reason, and of international law; and, finally, since the end of the eighteenth century, through that movement which received its impetus from the historical school and still continues in the legislation and in the codifying labours of the present age. Besides, in all modern theories formed in our days, the development of the Roman law figures conspicuously as a model, presenting and bringing into view the general rules of every development of law.

§ 232. The course of the development of law during the Middle Ages is accordingly twofold, and runs parallel with

the division of social sway, according to different social strata, between the Church and the subordinate secular societies of a lower order, which were also, in part, invested with a dominant character.

Scripture was the starting-point of the ecclesiastical law; this was further developed by custom, borrowed from the secular society, and adapted to the principles of the Church, assuming a definite shape through the interpretations it received from the ecclesiastical leaders in the struggles for the assertion of the authority of the Church, and fitting itself to its wants by an almost spontaneous adaptation. The body of custom was gradually enlarged, continuing yet under the influence of Roman law, by rules established by provincial Synods, but still obtaining in the whole Church as customary law. Subsequently the ecclesiastical law fully emancipated itself, at least in theory, yet only by slow degrees, from the secular law, and presenting itself as independent and claiming Divine authority, obtained a central organ in Papacy, the dispositions of which, strengthened first by fictions of customary law, and, subsequently, by forgeries, taking the guise of legitimate decrees, were finally established as constituting the bulk of the laws of the ecclesiastical society, which had become entirely dominant; and these decrees were after the twelfth century comprehended in systematic collections and bodies of law. Later, after the reforming endeavours of the great Synods of the fifteenth and sixteenth centuries, the ecclesiastical law was again definitively collected into a body by the Synod of Trent, whilst the Church preserved in the legislative power of the Pope, grown more and more exclusive, a fresh source capable of continually enriching its system.

§ 233. The earliest records of secular law during the Middle Ages are again codes; barbarous collections—presenting a picture of the order and state of things prevailing in the period of the definite settlements which succeeded the dissolution of the Roman Empire.

The law of these codes plays in the life of the Germanic

populations a part somewhat similar to that of the law of Lycurgus in Sparta, and consists of a summary, partly, of customs, for the most part undoubtedly ancient, and, partly, of rules of law developed in the course of conquest and occupation. These codes, however, essentially differ from similar products of antiquity in this respect; that, in addition to the influence exerted upon them by these elements, the minds of the people, as well as of the authors and compilers of law, were in many respects influenced by Roman law, owing to the previous intercourse of the barbarians with the Romans during a long period. But, in other respects, also, these codes lacked any considerable degree of sacredness or permanence, finding themselves confronted by not only two *systems* of law, but also by two *theories* of law occupying a high level, namely, the ecclesiastical and the Roman, with both of which they were compelled to share their rule over the society. In addition to this, owing to the system of personal rights which obtained under the German theory that the law attaches to blood, and to the much smaller degree of exclusiveness prevailing amongst the barbarous tribal states, than amongst those of antiquity, systems of law belonging to different groups were often asserted side by side within a single territory. As regards the further cultivation of the law, it took place in parallel lines, and in two ways. First, by means of legislation, which still stood principally under the influence of the Church, and was effected, as for instance in England, in a manner vividly recalling the proceedings in the ancient *Themistes*, though under a ruder condition of things. By the decisions, or *Domas*, which were framed by the king and his counsellors in the assemblies of the people, not only the cases actually involved were adjudicated, but principles were also established and laid down for guidance in supposed cases. And at a more developed stage the products of legislation took a form similar to that of the ecclesiastical regulations, as in the *Capitularies*. The second development of secular law was by custom, amongst the fruits

of which must be distinguished institutions like the feudal ties, which arose under the influence of long-abiding circumstances, partly from ancient modes of thought and institutions, partly from those of Rome, with the aid of forms borrowed mostly from the Roman theory of contract; and rules of law which appeared in popular legal axioms, in the opinions of experts in law, in the *Weisthümer*, and in the practice of the popular tribunals, partly formed from the people itself, and partly keeping up their connection with the life and views of the people through the *Scabini* and the jury. These customs were collected anew during the twelfth and thirteenth centuries, the period of general ordering and of codifying during the Middle Ages, and were partly provided with the sanction of the sovereign power,—as, for instance, the *Libri Feudorum*, the code of Frederick II. in Sicily, the Spanish codes, the laws of Louis IX. in France,—and partly continued to be asserted as customary law, as collected, for instance, in the Saxon mirror, or in the Suabian mirror. Very soon, however, through a judiciary and through jurists and lawyers dissociated from the general public, and educated in the Roman law, the body of law became enriched with a new element, in the application of the principles of the Roman and ecclesiastical law, and even of new and special rules. In the assertion of this element the great mass of the people had no influence whatever. This, although its source could be traced to no legislative action, nevertheless, generally obtained as jurist's customary law, and, in some departments of law, rose to an importance surpassing all the rest; whilst, finally, in some territories, as in the *Pays du Droit écrit* in France, and in the fifteenth century all over Germany, the whole body of the Roman law was received as common law.

§ 234. The theories of the law of nature, and of the law of reason, gave, from the time of Grotius, a new direction to the development of law throughout all Europe.

The works on the law of nature and on international

law, which made their appearance from the time of Grotius down to Vattel, were regarded by the public opinion of the civilized nations as real sources and codes, as it were, of international law, on the foundation of, and in accordance with which, international customary law was being built up, whilst its details were supplemented almost in the way of legislation by the principles established in the great treaties of peace, more especially after the peace of Westphalia. The ascendancy of the school of the law of reason in the province of private law went everywhere, except in England, hand in hand with the continual spread of the application of the Roman law. The popular customary law was meanwhile more and more pressed back, whilst special legislation and juridical interpretation proceeded with intensified vigour. At length, however, beginning with the middle of the last century, or, in France, with the end of the seventeenth century, the work of codification commenced in civil law, in criminal law, and in the law of procedure, in connection with the attainment by the national state of absolute consciousness and dominion.

After the French revolution, a reaction was initiated by the historical school against this work of codification, which had in America and in France begun to extend to public law, on the ground that it was premature, and was again, in part, generally inexpedient; and the results of this reaction showed themselves in the decrease of the influence of the theories of the general and equalizing law of reason, and in their being replaced, to a great extent, by a theory which deduced its principles from the study of the Roman law, and from the alleged peculiar nature of affairs. This tendency, however, did not interrupt codification, but merely added to the material from which it drew its contents, whilst the codes which were adopted and put in force, formed contrary to the apprehensions of the historical school, and to the expectations of their authors, no bar to the further development of law, which at this day is mostly effected through judicial practice, and scientific

juridical interpretation, leading to legislative action which is ever amending the codes. In the field of international law, the preponderating development from customary law has been supplemented also by enactments — almost legislative—between states, by means of treaties and international congresses, constantly accompanied by scientific interpretation and amplification, and leading to attempts, in most recent times, not only at theoretical codification, but, with at least some assurance of success, at practical codification as well.

§ 235. A comparison between the phenomena of the development of law and social development, renders obvious the natural parallelism between the two processes. In the same way as the most primitive societies arise from inorganic society, and those, again, of a higher order from the preceding societies, so law, the order of the society, is also founded, in the first instance, upon instinctive conduct, whilst in its more developed phases it always presupposes other anterior bodies of law.

Every society proceeds from individual initiative, springing from the sense of necessity with reference to special concrete cases. This leads later to the complete state of society—although it may be not fully conscious, nor active in details—when the sphere of interest supplies the vital principle. The society is attended by success when it is founded on a firm conviction capable of exhibiting the inclinations of masses, of attracting them to its sphere, of prompting them to the necessary activity, and of disciplining them. But, although the development of the consciousness of the social interest in the widening sphere of the society always remains somewhat behind its external consolidation, and further organization is to a great extent the result of almost involuntary accommodation, nevertheless, this spirit does produce modes of conduct of a more and more general nature, in every direction of life; whereas initiative activity, in conformity with the special relations of primitive circumstances of a narrower sphere, is necessarily more irregular, and varies with

every changing case. It is owing to this that every manifestation of law begins with a determination having reference to special concrete cases, whilst the circumstance that this determination is ascribed to superhuman promptings is always in consonance with the mysteriousness of the new social interest, with the impossibility of explaining it upon the grounds of the previous circumstances of social co-existence, and with the exceptional authority of its initiator. For it is usual to derive the unconscious, that which is imperfectly understood, from superhuman forces, that is to say, to deify it. To such decisions were added, as purely human factors, military, religious, and ritual commands, which became habitual, in consequence of struggles and vicissitudes, and, being constantly reiterated, owing to their expediency and to natural selection, obtained at length the character of permanence. The apposite comprehension of these various elements of law, the recognition of the various and coinciding conditions—already involuntarily accepted—of the organism of the society, the declaration of law in a body of laws, as well as in its consistent assertion, is then effected by the primitive codes, containing promiscuously religious and secular propositions. Again, the true source of the authority of these primitive codes is the overpowering influence of genius, which appears in the light of Divine inspiration. It is, in truth, this element of overwhelming individuality, towering far above the average, which thus for the first time obtains recognition, and which, although unable to assign reasons to itself and to its surroundings for every one of its measures, yet, instinct with the prophetic power of inspired lights, discovers the very order necessary for the consolidation of the prevailing society, and makes its enactments appear natural and indispensable to the members, because corresponding to their instincts, to the capacities evoked by their surroundings, and to the extent of their readiness for action.

§ 236. The order of the society and of law, in this its early, although not quite primitive, phase, is still, and to a preponderating extent, considered as Divine, and for simple

reasons. In the first place, faith in the immediate interference of the Deity is still vivid. Next, to the extent that men rise to the level of abstract conceptions, and thus to notions of permanent religious, natural, and human causalities, they also hold the latter to be of an identical character, and the results of identical agencies, and thus to be interchangeable. Thirdly, because men are unable to explain the formation of such an order, except by deriving it from superhuman power and consciousness. Finally, because the members of the society venerate as Divine every kind and source of authority, except that of rude force, the blind prostration before it being a stage which they have already passed.

Hence arises the strict formalism of the early law, and the admission of its applicability only in cases where its forms were rigidly observed, so that no cause derived its validity at all from the natural appropriateness of the proceeding or from its proper bearing upon the matter of the cause, but merely from the ceremonials—of a strictly religious character at first, and afterwards partly of a religious, and partly of a merely mysterious and traditional character—attending it, and only those relations were regulated and enjoyed the protection of the law, with regard to which proceedings had been instituted in strict compliance with the forms. For, indeed, on the one hand, every religious act is necessarily tied down to fixed formalities, for it is a general psychological fact that all intercourse with the transmundane is looked upon as capable of being effected only by means of immemorial and traditional expresssions and proceedings, to be scrupulously observed in their minutest details, and that this view is also transferred to all actions connected with earthly power, having a transmundane foundation. On the other hand, again, to the extent that the mode of explaining some relation, and the cause and ground of expediency of the connection between the antecedents and results of some relation, are not thoroughly understood, the lacking force of conscious conviction will be supplied by clinging to the

external part of the proceeding, and by faith put in its mysterious nature. Moreover, the instinctive preservation of custom will continue to protect ceremonial externals even after they have lost all their proper significance and importance, only that in the latter case, by their gradually wearing out and by becoming mere symbols, they hasten to their decay.

That the formalities of early social intercourse and of law are of such a nature, and not the conscious and intentional summary, in an artificial abridgment, of antecedent and designed action, is clear from the circumstance that the further back investigation into primitive conditions penetrates, and the more uncultivated the groups into whose customs ethnology inquires are, the more complex, extending to more numerous events of life, and the more detailed, as well as more scrupulous, are the ceremonials, and the more complicated and difficult of comprehension their bearings, whilst in a later and more developed phase they are more simple, and, as a rule, pervaded already by some elements of symbolical meaning, which were subsequently foisted in for the purpose of supplying the place of the original signification which had passed into oblivion.

§ 237. This ascertainment of the proper character of externals and formalities is important from the point of view of the development of law in its phase of customary law, and, in general, from that of the theory of the functions of customary law. One thing is quite certain, however, that the formation of customary law, founded upon identical conduct — under similar external circumstances — of individuals having the same instincts, dispositions, and modes of thought, has proceeded incessantly as an unconscious formation of law since the union of the earliest and most primitive social groups, and that, having obtained a new foundation in the primitive codes, it was afterwards, for some time, the only mode of development of the order of law. In other words, customary law held for a while exclusive sway over the society. This period was at the same

time the era of the supremacy of aristocracies in the societies that had attained dominion; the law, being traditional, was preserved in the memory of, and applied and interpreted by those who represented the more ancient and respectable element, who were the ministers of the intercourse between the people and the gods, and who, having acted a part in the struggles of the society, had become more bound to the conditions of its maintenance, and hence, shared to a greater extent in the traditions of the past as well as in the perception of the tendency of the development of the state, than the great bulk of the people. The latter consisted, as a rule, of elements foreign to the society and coming from without, or were, at least, mixed up with such elements, whilst the aristocratic class were the descendants of the first founders of the society and of their followers, and the inheritors of their power and spirit. Properly speaking, therefore, custom, during this period, did not keep developing, but was, at most, scientifically and definitely consolidated and amplified with those symbolical and conscious elements which were adapted to the conceptions entertained by the aristocracies concerning the social interest.

This aristocratical customary law ignores the wants of the lower classes of the people and their customs arising from wider circulation and closer intercourse, and appears to the people uncertain and oppressive, partly owing to their want of familiarity with it, and partly to its motive being incomprehensible to them. In antagonism to this aristocratical customary law arose, therefore, popular custom which, as it was deemed beneficial by the people, the sense of justice of the lower classes wished to assert, although they were unable to obtain for it the formal sanction of law. Where the efforts tending in this direction were utterly suppressed, and the authority of the upper classes proved irresistible and became firmly rooted, there the progress of the society also came to an end. If again the mass of the people suddenly triumphed, there was great danger that the society would relapse into one of an inferior order. If, however, after a

protracted struggle, in the course of which the subordinate classes become capable of hardened discipline and of deeper insight, the traditional becomes mitigated and enlarged, in conformity with the new wants, without breaking with the memories attaching to the past, the possibility of a gradual transformation and of conscious social progress presents itself, and legislation guided by considerations of expediency will be called upon to satisfy its claims.

When, therefore, legislation and juridical interpretation thus set in, custom still appeared in connection with these. It sometimes figured as the general common law, creating, supplementing, and even abrogating special enactments, with regard to the whole society; and at other times as a partial source of law; but even at a subsequent period, when law is conceived as a scientific system, and occasionally becomes the object of codification, custom still continues to create special law, although of a comparatively secondary character.

The conscious establishment of law, in every new field which it embraces, is preceded by the formation of usage, afterwards, of legal custom, and at length, of customary law; custom remaining thus, with regard to all the species of law; which subsequently preponderate, their substratum and the soil from which they draw their sustenance. Custom is also called upon to perform another decidedly important part in the assertion of statute law itself. A strict analysis of the authority of law will show that, although it is confessedly the positive and conscious emanation of the sovereign power of the state, yet, as long as all the members of the society do not stand upon the same level of wider discernment which is occupied by those who wield the supreme authority, it derives its force mainly from custom. The commands of the sovereign can undoubtedly be enforced by the material power at the disposal of the supreme authority, but their general enforcement, nevertheless, becomes only possible if the necessity of employing coercion is exceptional, and the subjects obey, on the whole, voluntarily, under a self-discipline

representing moral suasion, which, as it does not rest upon conscious agreement, must necessarily be founded upon acquiescence through custom.

§ 238. The circumstance that customary law, an element of law lying outside the consciousness of the sovereign power as well as of the juridical profession, thus pervades the history of the development of law and permeates all its other departments, is the reason, why the theory of customary law always exerted a paramount influence in the doctrines of the formation of law. The action of the other factors was modified by this one, the proper determination of the part played by customary law in the mutual relations of the various forms and sources of law being, indeed, at all times most difficult. In early antiquity some kind of theory was developed in Sparta with reference to its peculiarly traditional, purely aristocratical and exclusively dominant customary law, usually designated by the expression "*τα πάτρια*," according to which its authority was derived not only from its semi-Divine origin, but from its having been practically tried and found to be in perfect harmony with the welfare of Sparta. Its obligatory force was, therefore, referred partly to its origin, partly to its having been inherited from ancestors, and partly to its expediency having been practically proved. The conviction of this became so thoroughly rooted in the Spartan community, that it always clung to the maxim bequeathed by the remote past, that there was no necessity for written laws. In Athens, on the other hand, where statute law had preponderated from an early period, all investigation into the origin of law busied itself with law recognized as such: and even the circumstance that the laws of Draco were not able to assert themselves in opposition to custom, appeared only in the light of a fact, and did not lead to the perception of the force of customary law as sufficient to abrogate statute law. Only Plato, who was distinguished for his predilection for Doric institutions, assigned an important part to customary law as capable

of being engrafted upon men by the Deity and through education. Plato clearly points to this, in arguing that, although the condition of that state is most favourable, in which there exist no permanent and inflexible laws, unfit to be adapted to varying circumstances, and where the Deity or a Divine king alone rules in accordance with commands suiting special cases: yet customary rules, though always imperfect, are preferable to the arbitrary control, whether of a despot, or of the mass of the people. Customary law was regarded in Rome as having a place beside the written law, and being but little inferior to it as a source of law, yet not as exclusively taking the place of written law, as it did, at least according to the time-hallowed theory, in Sparta. Several doctrines, somewhat deviating from each other in detail, but becoming ultimately reconciled, arose concerning the mode of the formation of customary law, and the foundation of its authority. Cicero gives prominence to these features, that it insensibly arises from nature, is fostered and enlarged by practice, and, through the approval of the mass of the people, develops into morals by its antiquity. Paulus, too, founds its authority upon the experience of its justness. Julianus, again, traces it back to the consent of the people, as to which it is irrelevant whether it be declared by votes, or by acts and special cases. In this view Julianus is followed by Hermogenianus, who calls customary law the implied consent of the citizens. In other places, again, the circumstances, that its justness has been proved by long experience, that it has been observed during a period extending over many years, and that it is acknowledged by those who live in consonance with it, are mentioned as the foundations of its authority, which extends alike to the creation and extinguishment of law, and which, its ancient derivation and its practical applicability being once certain, must remain unquestioned, even where its reasons cannot be reconciled with the established principles of law. Yet this authority loses its force whenever custom is proved to have originally arisen from a mistaken concep-

tion, whilst the authority of partial custom is limited and does not destroy either law or rational consideration.

§ 239. The theory of customary law underwent during the Middle Ages a modification, by being connected by the Glossators with the doctrine of prescription, a doctrine traces of which may be discovered in certain expressions to be met with in the Code of Justinian, and which, later, was accepted by the canon law without qualification. Hence arose the requirement, that it should endure during a definite and long time, or during a time against which the memory of man runneth not to the contrary, which requirement, as has been observed by Verböczy, the illustrious commentator and first codifier of Hungarian common law, at the end of the fifteenth century, is not always identical with that other requisite, which has not been accepted as generally as the former, that it should manifest itself in repeated acts. For one act alone, if attended by a permanent effect during the proper period of time, is also sufficient to establish it. From the analogy between customary law and prescription was afterwards deduced the postulate of the rationalness of the former, that is to say, of its conducing to the happiness of life, or to public weal.

The hypothesis of the dependence of the authority of customary law upon such external circumstances obtained a readier and more exclusive recognition from scientific writers, in proportion as the position it occupied in the development of law in connection with legislation was more subordinate, and the more its proper foundation was sought in the implied consent of the supreme power of the state: a proposition which as early as the end of the past century enlisted the exclusive consideration of Heineccius, and was accepted in England by Bentham and Austin, in that form, in which customary law was by them looked upon as usage—confounded by them also with morality—which had obtained the ulterior sanction and protection of the state.

§ 240. In opposition to this view,—according to which

the authority of jurists' law was properly distinguished from that of customary law, and, except by the English jurists, erroneously derived from the authority of the law of nature,—as well as to the endeavours and belief which had sprung up simultaneously with it, concerning the possibility of establishing a thoroughly exhaustive code, of preventing in future the formation of all customary law, and of excluding its authority by law, a new theory of the development of law was formed by the German historical school. This theory was prompted partly by a desire to demonstrate the connection of all law with national sentiment, and, partly sought to explain how and why the Roman law, which was unknown to the mass of the people in Germany, had, during the fifteenth and sixteenth centuries, been generally adopted in that country as fundamental common law.

Going back to the old Greek parallel between the origin of language and of law, this theory laid it down that all law proceeds from the consciousness of the people, and that its authority, likewise, proceeds, not indeed from the will of the people, but from the fact, that it accords with the sentiment of the people. Accordingly, customary law existed, in all its fulness, from the very beginning, and is by usage only manifested, and by application externally established. Hence customary law should be the immediate creation of law by the people; in other words, the direct realization of moral sentiment, which is effected under preponderatingly primitive, simple, and transparent circumstances, but which takes place later, also, in all those fields in which popular life is able to freely develop; whereas the formation of law by jurists as well as legislation is but the creation of law by means of transferred authority, in which process jurists' law still preserves the external form of customary law, whilst as to legislation, every vestige of its connection with its proper source, the sentiment of the people, is often lost.

The chief founders of this theory were, however, themselves compelled, from its very first exposition, to deviate

from their own doctrines. First of all, they had to reject the exclusive possibility of the rise of purely national law, with reference to the cases of the formation of ecclesiastical law, as well as of the reception of Roman law as the common law of Germany; and, in addition, they dropped the spiritualistic conception that usage brings law to light merely, but does not beget it, and law, being strictly internal, exists already in morality. They laid down instead, that usage is as essential to the formation of customary law as publication to statute law; that usage forms custom, and the latter, again, forms law, from the moment that the liberty of arbitrary deviation is not admitted; and it was even allowed that the authority of customary law originates both from the inner consciousness of law and from the observation of its effects, since the historical school acknowledged that the foundation of the obligatory force of law lies absolutely within itself, like that of morality, with this difference, however, that, according to the proper nature of law, it resides not merely in its idea, but likewise in its external being.

Finally, the science of law was accepted by the historical school, in its later phases, as an independent source of law, and thus a distinction was partly effected between jurists' law and customary law; although others again, in opposition to this, looked upon it merely as internal theoretical law, which by its application only becomes external, practical, and thus true customary law. As a consequence, the doctrine of the historical school became gradually modified to such a point, that the consciousness of the people is still looked upon as the only source of law, namely, that consciousness which extends to the sum of those propositions of law which correspond with the rational nature of man, and with the nature objectively attached to the circumstances of life at any given time, and so with the nature of the matter in question, and which hence are changing according to times and places; but such law either obtains amongst the community in the guise of morals, that is to say, it is actually

followed without having been established by the state, in which case it is proper customary law; or it is mediately brought to bear upon practical questions in the shape of jurists' law, and assumes new forms continually leading to new propositions, in consequence of scientific insight; or it is directly called into existence by means of legislation in consequence of its recognition through the more thorough consciousness of the supreme power of the state. Thus the framing of law is in no case a new creation of law, but the discovery and development of immanent law; and opinions are divided only as to the question whether this immanent law is, as internal customary law, at the same time actually positive, as the more rigid doctrine of the historical school claim, or whether it should not rather be identified with the law of nature, properly conceived.

§ 241. Two theories, each proceeding from a different point of view, arose in opposition to these views—one developed by Ihering in Germany, and the other by Sir Henry Sumner Maine in England. Ihering attacks first of all the conception that law, or any principle of law, might arise, like language or vegetation, without any collision and conflict; indeed, every principle of law which is asserted, must be enforced as against those who refuse to accept it, and the history of the development of law is nothing else but that of the gradual restraint of violence. The formation of law, proceeding from expediency, as yet unrecognized, but operating in instinct, begins with customary law; becomes subsequently strengthened by self-restraint, prompted by precaution and self-interest; and attains, later, its fulness in discipline and mutual accommodation, both on the part of the ruler and of the subjects; when it gives rise to legal order, and to the protection of every vital social interest by that supreme power which also, from self-interest, subordinates its own activity to these conditions; this legal order, again, finds an additional security in moral sense, and in the firm administration of justice, prevailing in consequence of the education of a systematically trained legal profession, and of its sense of

honour and of right traditionally maintained and vigorously developed, in connection with which objective law and moral sense, both of them occupying the same high level, mutually depend upon and support each other.

Sir Henry S. Maine, again, intimates that law begins with a feeling of veneration for the supposed inspiration coming from superhuman powers, perfectly identical and coëval with those sentiments owing to which, in the primitive and inorganic groups, single individuals possessed of conspicuous qualities rise above the others, and in consequence of which social organization proceeds on the foundation of necessity, not yet clearly felt, but instinctively developed. The recognition of the *Themistes* follows from this veneration and from the already habitual obedience to authority, and, whilst the *Themistes* are still held to be likewise of Divine origin, an accommodation to the recognized claims of social life is taking place in them through the individuals by whom they are declared. Through experience, guided by analogous cases and dispositions, usage was developed from these primitive germs. Usage, by slow degrees, grew into custom, appeared more and more easy of practice by dint of repetition, and presented itself as something like a permanent foundation of the *Themistes*, until it at length became quite independent of the causes that originally produced it. Customary law developed again into morals, and the latter evoked moral sense, especially in those who, called upon to rule, seized upon power and formed the aristocracy.

Usages, customs, and morals were, on the foundation of this moral sense, subsequently recast, in the bosom of the aristocracy, into an organic system, every part of which had indeed originally sprung from the consciousness of some part of society, but which was, on the whole, no longer connected with it, but constituted, together with the religious ceremonies, the privileged property of the definitely established aristocracy. Customary law subsequently manifests itself only as a supplementary and

secondary source of law, and asserts itself again more vigorously in those cases alone where the legislative supreme power becomes impotent and the organism of society sinks to a lower level.

§ 242. There can be no doubt that the views of the historical school, in so far as it paid due attention to the once neglected agencies of community, represented, in comparison with that of the older doctrines, a decided advance, although it omitted to take into account in this connection the hitherto overrated individual influence upon the creation of law. And there can again be no doubt that, in its efforts at throwing light on popular sentiment, as well as in the fact that it entered more deeply into the consideration of the completely diverging modes of thought of ancient and modern times, it succeeded in finding the key to numerous historical phenomena which had heretofore remained unexplained, or at least were not thoroughly understood. On the other hand, however, it is equally undeniable that the historical school fell into the optical illusion of considering the ancient states of things, made clear by its discoveries and methods, as being in reality entirely primitive, simple, and transparent, and of regarding those spheres and classes, into whose customs, views, and creations they had inquired, and which were, properly speaking, aristocracies, as the whole people. The subsequent and more thorough historical investigations, however, which it is the merit of the historical school to have given the impulse to, have demonstrated the insufficiency of their theories in this respect, and Maine's remarks, concerning the period of the preponderance of customary law, agree much more with the ascertained facts, as well as with the general laws of development, than do the hypotheses of either Savigny or Puchta. At the same time, the theory of the historical school remains as yet untouched in respect to the circumstance that, in those new fields to which law has not yet extended, customary law is always the first form which, as the relations of the society develop, appears in its ordering, and that it is thus at all times an enduring

source of law with regard to several of its branches, if not with regard to the general life of law. Besides, the statement of Ihering, to the effect that the assertion of any new law, and hence also of customary law, can only be achieved by struggles, is quite just, and fully agrees with the sketch of the march of development as delineated by Maine; and it is equally certain that a distinction must be drawn between processes, in which the acceptance of rules of law, consciously created, can be, even in an indirect way, enforced by the sovereign power, and others in which the formation of law is in reality unconsciously effected. This distinction, however, was confounded by the historical school, owing to the circumstance that jurists' law was looked upon by it as a species of customary law. Whenever a rule of law is established anew, or recast, whether from considerations of expediency, of equity, or of scientific systematism, its characteristics, both in the modes of its assertion and in its consequences, will always considerably differ from those of law which became formed unconsciously.

Progress of a higher degree, again, is only possible with legislation having a definite object, and with scientific labours. Both Maine and Ihering dwell upon these agencies singly, and treat separately — and Maine exhaustively — of juridical work and its results, of case law, of equity, and of scientific law, as well as of legislation, by which method they have, at all events, succeeded in supplementing the doctrines of the historical school with matter coming much nearer to the actual facts. Ihering, however, lays, again, greater stress upon individual judgment as to expediency than is justified by events, giving thus in his theory of law an undue prominence to subjective elements. The theories of Maine, too, owing to the self-imposed limits of his works, are not entirely complete, in so far as they are less detailed with regard to those periods of the formation of law, during which the sense of subjective right and individual action play the most prominent part, namely to the very earliest periods, and to those of the very highest development.

§ 243. The temptation to confound jurists' law with customary law was all the greater, since one kind of it, namely, judicial practice, as far as it is effected neither by decisions of authoritative validity nor by conscious explanation, really partakes of the nature of customary law, or, rather, forms the transition from customary law to proper jurists' law. It is indeed customary to comprehend under this designation several species of law, common elements, however, of which may be found in those motives which exert an influence upon its formation, and upon the modes in which it manifests itself. In the sphere of jurists' law are to be especially distinguished case law, and the systematically scientific law, the former arising mostly from judicial proceedings, and far less from the opinions of jurisprudents with reference to special cases, whilst the latter is the result of the systematic and thorough elaboration of the law.

The characteristic feature of case law is, that the rule of law is not declared as one newly devised and having a future bearing, but is looked upon as already existing in some concrete case and deducible from its circumstances, as well as capable of being applied to its determinations, and is laid down as a rule which is either the logical inference from, or else supplementary to, the application of rules already existing, or simply the assertion of the effect of a source of law already operating upon a state of facts of actual occurrence. As a consequence, no sudden change and no innovations not connected with existing rules of law are ever effected in law by means of case law. Its formation through the latter always proceeds gradually, and with the slightest possible modifications, nor are the new principles thus obtained followed out at all times to their remoter consequences, but they assimilate step by step with the existing body of the law. This process is accomplished quite imperceptibly and unconsciously, almost in the manner of customary law, through the regular operation of the courts of justice, that is to say, by means of ordinary judicial proceedings. Almost every concrete case which

becomes the subject of application of some rule of law in a judicial decision, deviates in some slight point from the ideal case present to the mind at the time that rule was first established. Hence, since the meaning of the rule follows that of the average of the cases to which it is applied, the view relating to it becomes also modified with the gradual deviation of that meaning from the original conception, and adapts itself to the new circumstances embraced in the adjudicated cases.

The other species of case law arises in cases where, without any intention of altering a rule, it becomes, through its conscious interpretation, more clearly defined; whilst authoritative precedents, and occasionally the opinions of jurists, invested with authority, form a sort of legislation by case law.

The method employed in these proceedings is always interpretation, which may expand into the application of legal fictions, and even into the assertion of legal analogy. Interpretation is the determination of the sense of some rule of law, and that, either of its original meaning, or of that meaning which it may since its first establishment have obtained through new and modifying circumstances. Legal interpretation is authoritative, if its result is regarded by the sovereign power and its organs as generally binding, and not only in the concrete case in the decision of which it was obtained. Again, if the interpretation takes place in the way of creating law, by rules of law, it becomes, as a consequence, equivalent to statute law or customary law, but with the difference, that it possesses a retro-active or *ex post facto* character. It is, on the other hand, scientific if its force is based on theoretical considerations alone, and if its effect is only to point out the direction in which the rule of law should be applied, and, at most, to establish law, not directly, but indirectly.

Scientific interpretation is, according to the means science has at its disposal, either grammatical, logical, historical, or systematical. From the point of view of its results, again, interpretation is either simply declaratory, that is

to say, constructive, or restrictive, or extensive, that is liberal. When declaratory, it is merely designed to determine those circumstances and that authority, the considerations of which entered into the operation of the agencies of the formation of law. When restrictive, it confines in opposition to any modifications of the application of rules of law, the rule in question to the province for which it was originally intended, which rule, in the absence of this restrictive interpretation, would be undesignedly extended to a wider sphere. Extensive interpretation finally extends the authority of a rule to cases in which its application involves the same reasons as led to its application in the cases originally governed by the rule; in other words, it determines that certain cases fall under the head of some established principle, which were not, in the first instance, recognized as involving consequences of a nature to range them under that principle—it deduces, in short, the law from the principle of the rule, which extensive kind of interpretation is sometimes also styled *Analogia Legis*.

The application of analogy of law, properly speaking, *Analogia Juris*, differs from interpretation in producing, in general, a greater change in law, and involving some supplementing of the established rules, and, thus, a meditated purpose of creating new law. It consists in this, that, for the purpose of filling up some existing gap in the law, a new rule is framed on the foundation of a principle accepted in the existing system of law, that is to say, upon the basis of a principle that stands in the same relation to the proposition to be established, as do the accepted and recognized principles to the concrete and authoritative rules of law. Proceeding by legal analogy is, accordingly, to deduce law upon the basis of an antecedent abstraction—in consonance with the other principles of the system of laws—of a principle which has not been heretofore declared; a scientific insight into the law is, accordingly, in this process, indispensable.

§ 244. The character of law thus modified or newly

created through the agency of extensive interpretation, or of legal analogy, can be at once recognized from its very inception. Hence, during that phase of the development of law in which its religious or ceremonial elements are paramount with regard to its authority, as well as during the period of the preponderating sway of customary law, these modes of formation of law cannot prevail, since the formal sacredness of the rules of law, and instinctive obedience to them, are incompatible with the admission of any alteration. Hence arises the effort to satisfy new needs, as they spring up, by proceedings corresponding with rules that cannot be either artificially augmented or modified. The simplest mode of effecting this is that afforded by symbolical conceptions, and the use of formalities, every act performed with certain ceremonies being governed by the rule of law connected with these formalities. In case these ceremonials are applied to a new object, or are used symbolically, the former meaning and authority of the rule remains intact, whereas the rule itself expands, by extending its sway over the new case.

Thus arise the symbolical causes, amongst them the so-called *Dicis Causa* of Roman law, according to which a new cause, provided with the externals of another cause long since regulated, obtains likewise the sanction of the law, or according to which, when a proceeding has sunk into formality, its authority is upheld whilst its inconveniences are avoided. In this way, in many instances, the establishment of new notions of law and of new principles is practically attained without producing, from the outset, any conspicuous changes in the body of the law itself. Another step in the same direction leads to the formation of legal fictions, in which the conscious result is the expansion of law, whilst leaving it formally intact.

Legal fiction is that process by which a case, which does not fall under the head of a rule of law, is yet embraced within the sphere of its extension, by leaving out of consideration the points wherein it differs from the other cases ranged under the rule, and thus reducing it to

equality with the rest. Consequently, either a part of the elements really involved in the case are disregarded, or the case itself is looked upon as being supplied with the elements actually lacking, and thus, in employing legal fictions, it is not the rule that is apparently modified; although, in reality, the result is always the extension of the rule to groups of new cases, and thus, while the former meaning of the rule is preserved, it is also supplemented by a new one. Both symbolical causes and legal fictions are, therefore, properly speaking, the fruits of early phases of the development of law; yet, owing to the convenience of their employment, they are often maintained during later periods, when their real character has become manifest, especially, since by this means the multiplying of the rules of law is apparently avoided, and new formations are rendered unnecessary; legal fiction also appears as a mode of facilitating the comprehension of law into a system.

The part thus played by legal fiction was, however, entirely misunderstood within the sphere of the purely rationalistic philosophy of law prevalent towards the end of last century. Heineccius classes them amongst those artful contrivances which were employed by the prætor, under the pretence of equity, to evade the law. Bentham, although he acknowledges that there was a time when fictions might have been useful, nevertheless defines their nature as follows: "A fiction of law may be defined—a wilful falsehood, having for its object the stealing legislative power, by and for hands, which could not, or durst not openly claim it, and, but for the delusion thus produced, could not exercise it," and mentions as its characteristic features, that fiction being "a false assertion of the privileged kind, though acknowledged to be false, is at the same time argued from, and acted upon as if true. . . . It has never been employed but to a bad purpose. It has never been employed to any purpose but the affording of justification for something which otherwise would be unjustifiable. . . . It is capable of being employed to

every bad purpose whatsoever. It has never been employed but with a bad effect. . . . It affords presumptive and conclusive evidence of the inaptitude of the form of government in support of which it is employed or under which it is suffered to be employed. It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed. . . . It affords presumptive and conclusive evidence of intellectual weakness, stupidity, and servility in every nation by which the use of it is quietly endured."

In opposition to this view, and forming, as it were, a sharp contrast to it, is the definition proceeding from the historical school. According to it, legal fictions are not designed at all to facilitate the process of transition, nor were they, in any wise, employed for the purpose of preserving in this way, in appearance at least, the affection for ancient things. Now if, as is usually the case, legal fictions are conceived as marks of the conservative sentiment of the ancient Romans, this cannot mean anything else, but that the material changes themselves were effected in the closest connection with the existing state of the law, as extensive interpretations of the law already established, so that this internal relationship itself found its most fitting and appropriate expression in the form of fictions. In other words, legal fiction is but the employment of cultivated legal technical language in legally defining the nature of some legal relation; it ranges under an identical notion of law, cases which as yet are not governed by it, and places them on an equality with those that already fall under it. Hence, it does not, properly speaking, empower to do anything that could not have been done before, but only serves to point it out, yet, naturally, in such a fruitful and conservative shape, that this conservation frequently contains the germs of creative power.

According to this view, legal fiction has solely a historical value; its dogmatic use is quite erroneous, and the conception, that a system of laws is rendered homogeneous,

and every apparently illogical phenomenon in law reduced, by purely scientific fictions, to a simple point of view, is equally incorrect.

This theory would derive legal fictions from the *Jus Sacrum*, the sacerdotal law, in which the principle that *in sacris simulata pro veris accipiuentur*, had long since been recognized, and legal fiction is, according to it, merely the idea of the sacrificial fiction—which was made use of in antiquity as a simple means of warding off the wrath of the Deity, and of enlightening it as to the conviction of the willing intention of the sacrificer—put into a general theoretical shape. The connection of the acts of public law with sacerdotal rights gave rise, first to fictions in public law, and afterwards in private law, which fictions, however, were by no means founded on invention. The priests no more intended or wished to make believe that the waxen imitations and figments were actual sacrificial animals, than they did to attribute, through the *formula fictitia*, a real or even legally supposed existence to a fact not existing. In both these cases, however, something that existed and something that did not exist were equalized—in sacerdotal rites, through custom and regulation by precept, in order that the debt due to the divinity might be looked upon as having been paid; in law, that a rule of law or notion of law might be transferred to some actual relation, and the latter obtain a legal effect equal to that which attached to the relation which originally came under the rule of that very notion of law.

This theory, however, of the connection of legal fiction and sacerdotal law and of an entirely conscious application of legal fictions, if looked upon in the light of history cannot be verified. Legal fiction was not only in Rome, but everywhere, one of the agencies of the development of law, and was made use of at periods much earlier than those in which its voluntary and conscious application can be inferred. Where a certain system of law is already established and invested with authority and sacredness, and new wants present themselves, the latter give occasion

to extensive interpretation—and this even in places where the phase of customary law prevails—as soon as the latter has formed into a crystallized system. Existing rules unconsciously expand in order to render the disposal of the new cases possible.

Thus, in the village communities of India, the council of the elders is sometimes obliged to devise new rules, so as to be able to meet really new cases. The fiction, nevertheless, always prevails that the council have only given effect to customary law. New rules are, there, never ascribed either to the authority of their authors, or to rational causes, nor are they considered as emanating from a sense of equity, but there is always kept up a certain fiction, according to which these new rules are deemed to have descended from remotest antiquity, although in point of fact no one had ever thought before of the incidents which rendered them necessary. The first germs of legal fiction can, therefore, be traced to the circumstance, that for the purpose of disposing of a practical difficulty, it was found to be the simplest expedient to turn to the best possible use the existing means and notions, and this undoubtedly was at first done quite unconsciously.

Fiction was simply the avoiding of difficulties, instead of the solution of them. The judge or lawyer afterwards intentionally shirked the trouble of altering the old-established suits or notions, so as to make them correspond with new claims, and thus it was not necessary to resort to new remedies, which it might be more difficult to assert on the foundation of the existing sources of law. Later, when owing to the scientific cultivation of law and in consequence of long experience, the conviction became general, that the rules of the established system of laws were in themselves insufficient to meet new wants, and as the sacredness of law was no longer referred to its traditional character or to the authority of the written word, but to the principles on which it was founded, the function of legal fictions dwindled more and more in practice.

The guise in which these legal fictions appeared was

different at different periods. Their earliest form was that of mock-suits, afterwards they appeared under the mask of fictions in legal proceedings, and latterly, in the shape of extensive interpretation, founded upon analogy, nay, serving at length, not the purposes of practice and of the transformation of law, but merely to facilitate legal conceptions. Such a part assigned to legal fiction is, however, decidedly injurious, as it becomes, then, its purpose merely to save the trouble of elucidating legal principles. Further, it has the baneful effect of paralyzing and crippling legal reasoning, from sheer considerations of comfort, and, as has been observed by Sir Henry S. Maine —whose analysis of the formation and function of fictions is most accurate—has the effect, too, of preventing the harmonious order and symmetrical classification of the systems of law. Though, indeed, to use Ihering's words, mistakes in a system are not innocent, but belong to that class of mistakes which are most dangerous; for the proper classification of an institution in a system is but a proof of its just and substantial recognition and presentation. Every error in a system is both the consequence and the source of a faulty apprehension of the object, and a false guide. As long as any science has not assigned to all its objects their appropriate place in its system, it does not properly comprehend their import, for to comprehend does not mean simply to recognize a thing, but also presupposes the understanding of its connection with kindred objects.

§ 245. Accordingly, scientific juridical work, in urging the framing of new rules of law, develops in a contrary direction to that pursued by primitive labours in the field of law. Its highest aim is to comprehend the different laws into a homogeneous and harmonious system, and for the purpose of remedying the defects which thus became patent, to point out those principles from which new rules, corresponding with the developing needs of life, can be deduced. This object, namely the ascertainment, on the one hand, of the conditions of social co-existence, and, on the other, of subjective wants and claims, and thus, of the

sense of subjective right, and in addition the determination in conformity with these agencies, of the ideal and general standard of law as well as the particularizing of the law in accordance with concrete circumstances, may be accomplished from a mere practical point of view for the purpose either of having special legal cases properly decided, or of establishing some special rule of law. Or this end may be effected for the purpose of elucidating and explaining the doctrines of law, with a view to instruction; and, finally, it may be accomplished merely for the sake of science, and in order to fit all the parts of law into the frame of a philosophical system. Juridical labours may, therefore, according to their different objects, consist either in the construction and interpretation of the law, in the preparatory work for legislation and the development of law, in instruction, or finally, they may be philosophical, whilst in a concrete case all these endeavours may as a matter of course appear in combination.

The motives, too, which lead to the efforts at supplementing and modifying law, vary in their nature. Thus they may be inspired by a sense of equity desirous of putting in the place of the convictions of the past or the rigour of the law, representing an imperfect abstraction, convictions in harmony with the present moral conception or more precise generalization, which, if practically asserted, becomes embodied in a system of equity. They may further manifest themselves in a demand for radical reconstruction, in consonance with the changed order of society, and incidentally, for a change of principles, in that they substitute new ones for the old, and give, in that case, the impulse to reformatory legislation, by urging that the material of the law should be consistently and logically worked up and harmonized, and by disclosing the desirability of the full comprehension of the law into one body, and its actual and systematic declaration in conformity with theory.

Accordingly, the jurist may apply an abstraction, more immediate and of a lower order, or one more remote and of

a higher order, and may develop an ideal which can never be fully realized, and only be approximated. Yet the effect of this ideal upon practical life, and upon the agencies peculiar to the formation of law, will be always more potent, the closer it clings to concrete circumstances, and the more it takes into consideration the available forces, and the aims which may be proposed, in the present and in the nearer, and not in the remoter, future. Hence the phenomenon, that that most influential portion of the legal profession which is called upon to directly apply the law, always clings as much as possible to the established system of laws, causing, in consequence, judge-made law to be mostly conservative; the only exception to which, due to special historical circumstances, is furnished by parts of the judge-made law in England. Nor is this rule less accurate with regard to lawyers invested with the power of juridical decisions and of authoritative interpretation, who figure, independently of their usual position as judges, as organs of the legislative attribute of the sovereign power, as was the case with the *jurisprudents* in Rome, who were endowed with the "*legum condendi facultas.*"

§ 246. Legislation, the conscious creation of law by the appointed organ of the supreme power of the state is, from the very moment that law is conceived as strictly secular, and as the condition of social co-existence and development, and when the notion of the sovereign power is fully developed, the most important factor in the formation of law. Its motive springs are always considerations of expediency, considerations which at first are recognized from the point of view of a concrete and anticipated result, solely bearing reference to an isolated rule of law, and, subsequently, assimilate with the postulates of equity and of the sense of justice, until they, at length, demand more general and further-reaching measures and operations urged by scientific judgment.

Apart, therefore, from the primitive codes which were of an entirely different character, the result of legislation

consists, in the beginning, of isolated, occasional, and disconnected laws, subsequently, it manifests itself in comprehensive innovation, and, having reached its climax, leads to codification. Thus, the essential difference between codification and simple legislation consists in this, that whilst the latter enacts disconnected regulations and rules for different purposes, codification, on the contrary, establishes a complete system, endeavours to make all the rules accord, and strives to complete the regulations of the law in a direction which agrees with the needs of the maintenance and development of the society actually dominant, and answers its perfect consciousness. It is, in a word, only by codification that the science of law asserts itself in its entirety, in the field of the creation of law.

§ 247. The history of codification, however, also presents the picture of gradual development, and of a slow approach to its ideal. At first, codification appeared only as the authentic compilation and sifting of the law, the necessity for which arose from the imperfection of the private collections, from the difficulty or impossibility of obtaining an insight into the law, which had sprung from so many various sources, and occasionally, from the contradictory nature of some of its rules, and in this form it is called *incorporatio*, the most famous example of which is furnished by the digests of Justinian. It was quite natural that these digests should have disclosed the necessity of supplementing the law, a necessity which was, in this instance, met by the constitutions and novels, intended to complete the pandects.

All the codes compiled down to the last century appear as attempts of this nature, attempts often repeated during the whole of the Middle Ages. For the most part, however, these were not codes, but only law-books, proceeding from individuals, and subsequently asserting themselves as customary law. The necessity, however, of reducing the law to uniformity became more and more pressing in France, beginning with the seventeenth century, and in Germany with the eighteenth, in con-

nection with the consolidation of the homogeneous spheres of the state. To this was added the belief in the eternal and immutable character of the law of nature, and the endeavour to put an end, as far as possible, to the distinction of classes, and to equalize the law of every independent society.

These were the causes which first gave rise to the several codified departments of civil and criminal law, and of the law of procedure, and afterwards to the codes which comprehended the whole extent of the law. In these latter, the entire material of the law was not merely collected and supplemented, but also, in part, re-cast in consonance with the principles supposed to be just. At length, however, in the latter half of the last, and at the beginning of our century, the great Prussian, Austrian, and French codes made their appearance, hopes being entertained in connection with their establishment, that they would be final, and render superfluous every further juridical comment.

But for the very reason that these codes themselves represented an imaginary radical rupture with the past, and that, hence, their connection with the establishment of the national society, to which indeed they owed their origin, was not properly understood, the historical school, which had, with regard to the process of the formation of law, attained a more thorough insight than had the school of the law of nature, rose up against them. Savigny, in his work concerning "The Mission of our Age with regard to Legislation and the Science of Law," having first reviewed, critically and in detail, the Prussian and the Bavarian Landrecht, the Austrian Civil Code, and the French *Code Napoléon*, and having pointed out many of their improper regulations, which, being founded on misconceived doctrines of the Roman law, possessed no scientific value in themselves, and rather misled scientific thought with regard to law, brings before us the various agencies and phases of the development of law. He argues that the idea of the collection of the entire law,

and of its final establishment in codes, arises only in those periods in which the power of continued formation has ceased, or has, to a considerable extent, become enfeebled. According to him, modern nations do not possess the spiritual repose, and the sense of the continuity and progressive cultivation of the law met with in the Romans; but, on the other hand, the modern conception is more universal, more cosmopolitan, and capable of greater assimilation, features which, in Savigny's opinion, explain the reception of the Roman law under the influence of universal Christian culture.

Hence, a code can only be properly formed when the principles it embodies have definitely passed through the process of formation, and accord with the national life as well as with the claims of science, or—to express it more appropriately—when the consciousness of the conditions of social co-existence and development has already become clear and manifest. We must, at all events, constantly bear in mind, in forming a code, that it is the mission of the legal profession to continue its development; for it is clearly shown, in the instance of every established code, that it is neither possible nor expedient to interfere with its further development.

This last proposition has since been verified by experience, but its justness follows, besides, unavoidably from the nature of the application of law, and from the circumstance that modern civilization is progressive. Nor, consequently, is it possible to imagine a code of an absolute and definitive character, since new matter, the result of the modifications and increase of the relations of life, is continually arising, necessitating the application of the actual law to it, and involving the transformation of the law, as well as the initiatory labours for new legislation—tasks which properly belong to the legal profession. Yet, whilst the expectations and exaggerated claims with regard to codes were thus doomed to disappointment, and the conditions and difficulties of their formation were recognized, the advantage and even the

indispensableness of codes became also, at the same time, obvious.

At this day no one any longer expects a code to usher entirely new principles or an entirely new order into the world. In our days, its connection with the preceding stages of the development of the national law and with the state of the technical development of the science of law enters into the consciousness of all legislation; and it equally admits of no doubt that the application of a code to the practical exigencies of life can only be effected through the intermediary of science. In this connection, it has become also manifest, that it is impossible to embrace within a single code the whole public and private law of a nation, owing to the circumstance, that development in the various departments of national life does not everywhere rest upon the same principles. The various societies of a lower order, ranged under the society of the state, assert their influence in different directions, and in a varying degree. The influence of those which are on the eve of attaining dominion increases; whilst in the case of those descending from dominion it decreases; and thus necessarily the object pursued, at least in the present condition of the development of European civilizations, is not the establishment of one code embracing all the different relations of national life, but rather the establishment of separate codes relating respectively to civil law, to the law of procedure, to criminal law, to the law of public administration, and, occasionally even to subordinate departments of these several classes of law. As an additional reason for this, we may mention that whilst there are interests, the effects of which are preponderatingly asserted within the sphere of the state, there are, again, others of an international character—for example, the law of exchange, of patents, and of copyright—with regard to which a more satisfactory regulation of their relations can be secured by the reception of common and identical laws.

§ 248. The continuity of the development of law is connected, besides, with the formal character, with the

absoluteness, and with the permanence of the supreme power of the state. The society constituting the matter of the state changes, however; and with this change the principles of new law necessarily establish themselves parallel with the existing ones, gradually displace the authority of the latter, and finally replace them altogether. The successive operation of every agency of law, again, repeats itself constantly with regard to the principles of new law also; hence the complicated nature of the concrete formation of law, and the difficulty of pointing out in it the general laws of development. Accordingly, the rules of law are also engaged in a continual struggle against each other for their very existence, in which conflict the final triumph is secured by those which answer the essential conditions of social development. And although it is true that such rules as are opposed to these conditions may be temporarily asserted, yet natural retribution is sure to follow; for that society, the law of which is less just and less perfect, will unavoidably grow weaker as against other societies more favoured in this respect, and must finally decay.

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